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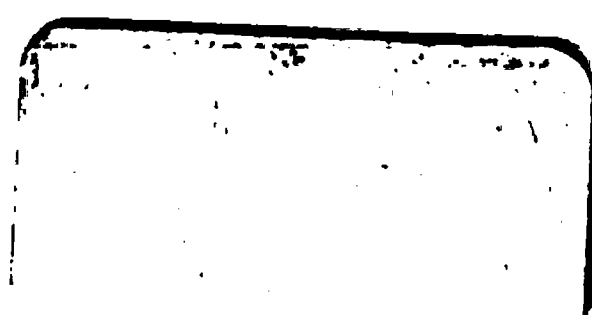
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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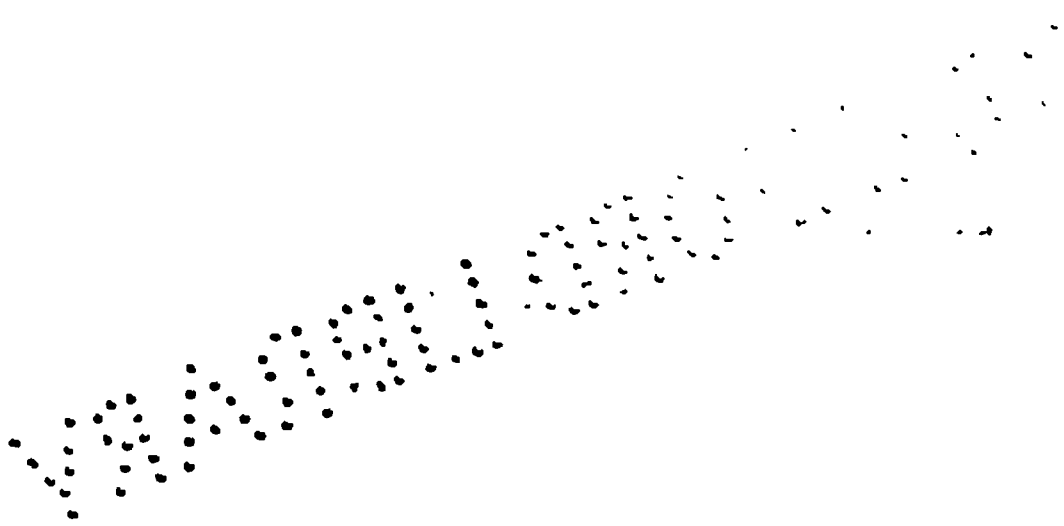
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Little Miami R. v. Fitzpatrick (42 Ohio St. 318), denied; **Tierney v. Minn. & St. Louis R. Co.** (33 Minn. 311), 39.

Lucas v. Gov't Nat. Bk. (78 Penn. St. 228; 21 Am. Rep. 17), overruled; **Nat. Ex. Bk. v. Boylen** (26 W. Va. 554), 115.

Mackin v. Boston & A. R. Co. (135 Mass. 201; 46 Am. Rep. 456), denied; **Tierney v. Minn. & St. L. R. Co.** (33 Minn. 311), 39.

Mayor, etc., v. Mayberry (6 Humph. 368), denied, **City of Chicago v. O'Brien** (111 Ill. 532; 44 Am. Dec. 315), 640, 641.

McCormick v. K. C., etc., R. Co. (70 Mo. 359), denied; **Abbott v. Kansas City, etc., R. Co.** (83 Mo. 271), 587.

Morris v. State (8 Sm. & M. 762), denied; **Bohanan v. State** (18 Neb. 57), 798.

Newcomb v. Horton (18 Wis. 566), denied; **Williams v. County Court** (26 W. Va. 488), 96.

Overhall v. Nat. Bk. (82 Penn. St. 490), overruled; **Nat. Ex. Bk. v. Boylen** (26 W. Va. 554), 115.

Pacific Railroad v. The Governor (23 Mo. 353), denied; **State v. McClelland** (18 Neb. 236), 815.

Pangborn v. Young (82 N. J. L. 29), denied; **State v. McClelland** (18 Neb. 236), 216.

Paxon v. Sweet (13 N. J. 196), denied; **City of Chicago v. O'Brien** (111 Ill. 532), 640.

Peet v. Beers (4 Ind. 46), doubted; **Birke v. Abbott** (103 Ind. 1), 481.

Pennell v. Deffell, denied; **Harrison v. Smith** (83 Mo. 210), 574.

People v. Bush (4 Hill, 134), denied; **State v. Baller** (26 W. Va. 90), 71

People v. Devlin (83 N. Y. 269), denied; **State v. McClelland** (18 Neb. 236), 816.

People v. Gilmore (4 Cal. 376; 60 Am. Dec. 620), denied; **Bohanan v. State** (18 Neb. 57), 798.

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Phelps v. Watertown (64 Barb. 121), denied; **Williams v. County Court** (26 W. Va. 488), 96.

Railroad Co. v. Webb (12 Ohio St. 475), denied; **Tierney v. Minn. & St. Louis R. Co.** (33 Minn. 311), 39.

Randall v. McLaughlin (10 Allen, 366), denied; **John Hancock Mut. Life Ins. Co. v. Patterson** (103 Ind. 582), 556.

Shane v. R. Co. (71 Mo. 237); 96 Am. Rep. 480), doubted; **Abbott v. Kans. City, etc., R. Co.** (88 Mo. 271), 587.

Slaughter v. State (6 Humph. 410), denied; **Bohanan v. State** (18 Neb. 57), 799.

State v. Martin (30 Wis. 216), denied; **Bohanan v. State** (30 Wis. 216), 799.

State v. Tweedy (11 Iowa, 850), denied; **Bohanan v. State** (18 Neb. 57), 799.

Smith v. Flint & P. M. Ry. Co. (46 Mich. 258), denied; **Tierney v. Minn. & St. L. R. Co.** (33 Minn. 311), 39.

Smoot v. Mobile & M. Ry. Co. (67 Ala. 13), denied; **Tierney v. Minn. & St. L. R. Co.** (33 Minn. 311), 39.

Tift v. Buffalo (1 Thomp. & C. 150), denied; **Williams v. County Court** (26 W. Va. 488), 96.

Washington v. Mayor, etc. (1 Swan, 177), denied; **City of Chicago v. O'Brien** (111 Ill. 532), 640, 641.

Weller v. Weller (28 Barb. 588), denied; **Pollard v. Slaughter** (92 N. C. 72), 409.

White v. Mayor, etc. (2 Swan, 864), denied; **City of Chicago v. O'Brien** (111 Ill. 532), 641.

Warren v. Blake (54 Me. 266), denied; **John Hancock Mut. Life Ins. Co. v. Patterson** (103 Ind. 582), 556.

Woodbridge v. City of Detroit (8 Mich. 274), denied; **City of Chicago v. O'Brien** (111 Ill. 532), 640.

Youngblood v. School Dist. (32 Mich. 406; 20 Am. Rep. 655), denied; **Williams v. County Court** (26 W. Va. 488), 96.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

WOLFORD V. BAXTER.

(88 Minn. 12.)

Fixtures — mortgage — casks, tubs and cooler in brewery.

Casks and hogsheads and fermenting tubs and a copper cooler, not fastened to the freehold, are not fixtures of a brewery, subject to a mortgage of the land. (See note p. 5.)

ACTION to prevent removal of fixtures. The head-note states the point. The defendant had judgment below.

F. Hooker, for appellant.

George N. Baxter, respondent in person.

MITCHELL, J. In February, 1881, the defendants Mueller and Siebold, being the owners of certain real estate upon which was situated a brewery, executed a mortgage on the premises to the plaintiff. In February, 1883, the same parties executed a chattel mortgage on the articles in controversy to defendant Baxter. The plaintiff claims that these articles were fixtures constituting a part of the realty, and as such were covered by his mortgage on the land. On the other hand, defendant Baxter claims that they were chattels. This presents the only point in the

case. The court below held that the air-pump and the iron pump, which were fastened to the building, were a part of the realty and covered by plaintiff's mortgage. Hence, as Baxter does not object, these articles need not be considered. It is too plain to require argument that the loose, circular rotary pumps, the swimmers, ice-tools, pitching-machine, and kettle were mere chattels. In fact, plaintiff makes no point as to them. This reduces the controversy to three classes of articles, to wit, forty-seven large coops, casks or hogsheads used for holding and storing beer, twelve fermenting-tubs and one copper cooler. In fact they may be reduced to two classes, for the coops and fermenting tubs stand on the same footing. The case was submitted in the court below upon an agreed statement of facts, which we will leave to be set out, so far as material, in the statement of the case.

It has often been remarked that the law of "fixtures" is one of the most uncertain titles in the entire body of jurisprudence. The lines between personal property and fixtures is often so close and so nicely drawn that no precise and fixed rule can be laid down to control all cases. It is difficult, if not impossible, to give a definition of the term which may be regarded of universal application. Each case must be more or less dependent upon its own peculiar facts. Whether a thing is a fixture or not has been sometimes said to be a question partly of law and partly of fact. Almost every court and every text-writer has attempted to define the term. None of these definitions are infallible or of universal application; but they are of service in determining whether an article is or is not, in a given case, a fixture. These definitions may be found collected in almost any law dictionary or text-book on the subject. We shall neither quote them nor attempt to give a definition of our own, but simply say that they all agree that "fixtures," in the primary meaning of the term (and distinguished from movable or tenants' fixtures), means chattels annexed to the realty so as to become a part of it.

While not agreeing as to the necessity for or the degree of importance to be attached to the fact of actual physical annexation, yet the authorities generally unite in holding that to constitute a fixture the thing must be of an accessory character and must be in some way in actual or constructive union with the principal subject, and not merely brought upon it; that in determining whether the article is personal property, or has become a part of the realty,

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there should be considered the fact and character of annexation, the nature of the thing annexed, the adaptability of the thing to the use of the land, the intent of the party in making the annexation, the end sought by annexation, and the relation of the party making it to the freehold. These other tests named, while having an important bearing upon the questions whether there has been an annexation, and if so its effect, do not however do away with the necessity of annexation, either actual or constructive, to constitute a fixture. This would involve a contradiction of terms and wipe out the fundamental distinction between real and personal property. A thing may be said to be constructively attached where it has been annexed but is separated for a temporary purpose, as in the case of a millstone removed for the purpose of being dressed or where the thing, although never physically fixed, is an essential part of something which is fixed; as in the case of keys to a door, or the loose cover of a kettle set in brick-work. It is perhaps somewhat on this principle that the permanent and stationary machinery in a structure erected especially for a particular kind of manufacturing has been held fixtures, although very slightly or not at all physically connected with the building, because without it the structure would not be complete for the purpose for which it was erected. Ponderous articles, although only annexed to the land by the force of gravitation, if placed there with the manifest intent that they shall permanently remain may be fixtures.

But while physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered a part of the freehold for any purpose. To make it a fixture it must not merely be essential to the business of the structure, but it must be attached to it in some way, or at least it must be mechanically fitted, so as in ordinary understanding to constitute a part of the structure itself. It must be permanently attached to or the component part of some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete.

On applying these rules and tests to the case in hand we are of opinion that the coops or casks and tubs in controversy have none of the characteristics of fixtures. They were not actually annexed to the freehold, nor were they of a nature to be deemed con-

structively affixed to the realty. It is true that they were well adapted to and necessary for carrying on the brewing business, to which the premises were appropriated; but this of itself is quite an immaterial element in determining the nature of an article. Many articles of a purely personal nature are useful and necessary in carrying on a particular business which can in no just sense be termed fixtures. These articles were no more essential to the brewing business than were the ice-tools, pitching-machine, or ordinary beer kegs, or are farm machinery for the business of husbandry. It is also true that it is stipulated that these casks and tubs were constructed for the purpose of being put into and used in this brewery, and were placed there with intent that they should remain there for permanent use, and that the vaults were excavated for the special purpose of storing therein such hogsheads, and that the ice-house was constructed for the special purpose of placing therein fermenting tubs in the first story and casks in the second; but it does not appear that the vaults were excavated or the ice-house built in any special shape to suit these particular casks or tubs, or that the casks or tubs were constructed to fit into any particular place in the vaults or ice-house. They were adapted to receive any other casks or tubs as well as these, and any other such casks or tubs would have been just as well adapted to be stored there as these. It is expressly stipulated that these tubs and hogsheads were of the same description as those in general use in breweries, and that they might be sold to other brewers for the purposes for which they were constructed. They were readily removed from the vaults and ice-house, and in fact were removed once a year or oftener outside for the purpose of being pitched or repaired. We can see no particular difference between them and ordinary beer kegs, except that they were used exclusively inside of the vaults or ice-house, and being larger, were somewhat more difficult to move. The intent that they should remain in this brewery for permanent use there is unimportant. Intent alone will not convert a chattel into a fixture. A farmer may take a plow or any other farm implement upon his farm with intent to keep and use it there until it wears out, but this will not make it real estate. Moreover, it will be noted that it is not stipulated that these articles were placed in the brewery with intent to make them a permanent accession to the freehold, but merely that they should remain there for permanent use.

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What has been said as to the hogsheads and tubs will in the main apply to the copper cooler. It was a loose, movable utensil, the same as in common use in breweries. The only ground for a distinction between this and the other articles is that when in use it was connected by a hose to a stationary water-tank in order to permit water to pass through it. When not in use the hose was disconnected and the cooler was laid away. The object and purpose of this temporary annexation was not to make the cooler a permanent accessory to the building, but for the purpose of using the article as a chattel. It may be on the facts a little closer case than that of the hogsheads and tubs, but the court below having found it to be personal property we see no occasion to disturb his decision.

Order affirmed.

NOTE BY THE REPORTER.—See note, 43 Am. Rep. 447; *Thomas v. Davis*, 76 Mo. 73; s. c., 43 Am. Rep. 756.

Tubs, vats, casks, etc., in a brewery, for permanent use, and too large to pass out through any existing opening, go to a purchaser under a mortgage of the land. *Equitable Trust Co. v. Christ*, 2 Flip. 599. So of a "Baltimore heater," and a weather-vane with the owner's name on it. As to marble slabs on counters, it is a question of fact. *Harmony B'ld'g Ass'n v. Berger*, 99 Penn. St. 320; and so as to a very heavy iron table in a glass factory; *Smith Paper Co. v. Servin*, 130 Mass. 511. A heavy iron drill fastened by screws and braces passes by mortgage. *Southbridge Savings Bank v. Stevens Tool Co.*, 130 Mass. 547. So of hop poles. *Sullivan v. Toole*, 26 Hun, 203. So of driving-belts in a factory. *Sheffield, etc., Soc. v. Harrison*, 15 Q. B. Div. 358. "Like the case of the key of a door of a house."

 MERCHANTS' NATIONAL BANK OF ST. PAUL V. HANSON.

(33 Minn. 40.)

Bank — National — ultra vires — negotiable instrument — notice of equities.

A national bank may recover upon negotiable paper purchased by it.

The indorsement of a note "for collection" is notice to a purchaser that the indorsee is not the owner.*

ACTION on notes. The opinion states the case. The plaintiff had judgment below.

*See to same effect *Gibson v. Hawkins* (69 Ga. 354), 47 Am. Rep. 757.

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Gordon E. Cole, for appellant.

C. E. & A. G. Otis, for respondent.

DICKINSON, J. One Luce was doing business individually, under the name of "The Bank of Breckenridge." He held several notes payable to himself by name, or by the name of "The Bank of Breckenridge." He indorsed these notes, "Pay G. C. Power, or order, for account and credit Bank of Breckenridge. [Signed] E. E. Luce," and sent them to the plaintiff bank with a letter requesting the latter to discount them and place the proceeds to his credit. The plaintiff retained the notes, crediting the Bank of Breckenridge with their amount, less interest to the time of maturity, and advised Luce of their action. The sum so credited was afterward paid. Before the maturity of the notes the plaintiff sent the notes to the Bank of Breckenridge for collection, having indorsed them as follows: "Pay Bank of Breckenridge, or order, for collection, account of Merchants' National Bank, St. Paul. F. A. Seymour, cashier." Luce, receiving the notes, transferred them by indorsement before their maturity, with the indorsements uncanceled upon them to the defendant in payment of a precedent debt. The defendant noticed the indorsements when he received the notes, but asked no questions and appears to have had no notice of the plaintiff's rights respecting the notes, except as it is to be inferred from what has been stated. The defendant having refused to restore the notes to the plaintiff, this action is prosecuted to recover their value.

In *First Nat. Bank of Rochester v. Pierson*, 24 Minn. 140; s. c., 31 Am. Rep. 341, this court decided that National banks were not authorized to purchase promissory notes in the ordinary sense of the word "purchase," the transaction not being a discounting of the paper, or a lending of money upon the credit of it; and the defense of *ultra vires* was sustained in an action upon a note so purchased. Since that decision was rendered the act of Congress upon which it was based has come before the Supreme Court of the United States for construction. *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99. The decisions of that court are to the effect that the enforcement in favor of a bank of securities upon real property, which securities the bank had acquired without authority, could not be opposed by the plea

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of *ultra vires*, but that it was intended by Congress that the consequences of such violations of law should be only such as might be imposed in proceedings instituted against the bank by the government. This construction of the law of Congress is authoritative and it is our duty to follow it. In doing so we necessarily overrule *Bank v. Pierson, supra*, as to the effect of the plea of *ultra vires* in such cases.

Applying the principle established by these decisions to the case before us, it is not material whether the transaction through which the plaintiff acquired the notes was a purchase of the notes in the ordinary sense of the word "purchase," or a discount of the notes as a loan to the payee. In either case the plaintiff's right as against this defendant would be the same. That the plaintiff acquired the notes either as its absolute property or as security is conclusively shown by the evidence. The defendant claims that the case shows a simple purchase of the notes by the plaintiff. This may be conceded for the purposes of the case. The special verdict of the jury, to the effect that the plaintiff discounted the notes for the benefit of the Bank of Breckenridge, is not inconsistent with their general verdict in favor of the plaintiff, and may be disregarded without affecting the result. The plaintiff was entitled to recover, unless the defendant is to be deemed as having taken the notes unaffected with notice of the plaintiff's rights. The court declared the indorsements sufficient to charge the defendant with notice of whatever interest the Merchant's National Bank had in the notes, and refused to submit the question of the defendant's *bona fides* to the jury. Whether this was error is the only remaining question to be considered.

It is well established that negligence on the part of an indorsee of negotiable paper for value and before maturity, respecting infirmities in the paper or the title to it, will not defeat the title of the purchaser or his right of recovery unless the circumstances are such as to convict him of *mala fides*. *Goodman v. Harvey*, 4 Ad. & E. 870; *Goodman v. Simonds*, 20 How. 343; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75, 79; s. c., 34 Am. Rep. 345; *Magee v. Badger*, 34 N. Y. 247; *Hamilton v. Vought*, 34 N. J. Law, 187.

We are of the opinion that the case conclusively shows the defendant to have acquired the notes, not merely negligently, but in bad faith. The indorsements to the Bank of Breckenridge "for collection, account of Merchants' National Bank, St. Paul," upon

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their face indicated that the latter bank had, or at least claimed to have, the title to the notes, and that the Bank of Breckenridge (Luce) was its agent, with authority merely to collect. *Rock Co. Nat. Bank v. Hollister*, 21 Minn. 385; *Third Nat. Bank v. Clark*, 23 Minn. 263. This assertion of title, as borne upon the notes themselves, was so placed as to show that it was presumably the last indorsement made. It is true the prior indorsement by the payee to Power, being restrictive, did not show that the payee had parted with his title; but it was not necessary that the payee should have indorsed the notes in order to transfer his title. *Pease v. Rush*, 2 Minn. 89 (107); *Foster v. Berkey*, 8 Minn. 310 (351); *Cassidy v. First Nat. Bank*, 30 Minn. 86.

If Luce had presented to the defendant notes not thus indorsed and had stated to him that a St. Paul bank claimed to own the notes, and had assumed to constitute him, Luce, its agent to collect them, a purchase of the property from Luce without further explanation and without inquiry, would, if unaffected by other circumstances, be palpably inconsistent with good faith. The case before us not less conclusively charges the defendant with *mala fides*. Luce, assuming to transfer the notes in payment of his own pre-existing debt, presented them to the defendant, bearing indorsements uncanceled and unexplained, which upon their face indicated that Luce had no right to dispose of the property, but that it belonged to another. Such was the unmistakable import of the indorsements. It was not to be presumed that the indorsements had been wrongfully or surreptitiously placed upon the notes. It was an extraordinary circumstance that Luce, if he was the owner of the paper, should when assuming to dispose of it as his own, suffer such indorsements, impugning his own title, to remain upon the paper unexplained. The defendant noticed the indorsements, but asked no questions. He testified in his own behalf, but no explanation or fact is presented going to oppose the conclusion which should be drawn from the circumstances which we have stated.

The defendant's purpose in acquiring the notes from Luce was of course to make collection from the maker for his own benefit. Having express notice by the indorsements that Luce probably did not own the property, but that this plaintiff was the owner, he could not willfully disregard the apparent rights of the plaintiff and by carefully abstaining from such inquiry as the circumstances

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suggested, assert the right to defeat plaintiff's title under the claim of being an indorsee in good faith. His conduct in disregarding the notice, and forbearing to make inquiries, is inexplicable except upon the assumption that he was regardless of the plaintiff's apparent rights, and willfully abstained from inquiry lest it should confirm the fact of which the indorsements notified him, and he should thus be unable to so acquire the notes that he might protect himself against the plaintiff's superior right. This was not merely negligence concerning his own interests or the rights of others, but *mala fides*. The proof of such *mala fides*, resting in the circumstances detailed, is unopposed by any fact going to support a contrary conclusion, and the court did not err in determining the matter as a conclusion of the law. *Jones v. Gordon*, 2 App. Cas. 616; *National Security Bank v. McDonald*, 127 Mass. 82; *National Bank of Com. v. Law*, 127 Mass. 72; *Fowler v. Brantly*, 14 Pet. 318.

Order affirmed.

ZIER V. HOFFLIN.

(33 Minn. 66.)

Libel — actionable words — damages.

Defendant sent to a newspaper, as an advertisement, a false statement that he wanted the plaintiff to pay a bill. The publisher put it among other "wants," one of which called for a "dead-head." A third person cut the advertisement out, pasted it on a postal card, and sent it to a young woman engaged to be married to the plaintiff. *Held*, libellous, and that it was a question of fact whether the sending of the postal card was a natural consequence of the publication.

ACTION for libel. The opinion states the case. The plaintiff had judgment below.

Woolley & Reed, for appellant.

Ripley & Morrison, for respondent.

GILFILLAN, C. J. According to the complaint, the defendant falsely and maliciously caused to be published, concerning the plaintiff, in a newspaper called the "St. Paul & Minneapolis Advertiser," widely circulated in the cities of Minneapolis and St.

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Paul, this: "Wanted, E. B. Zier, M. D., to pay a drug bill," in a part of the newspaper with the heading "Wanted," and among other similarly suggestive items, of which this may be taken as a specimen: "Wanted, ——— to pay his room rent, and not go dead-heading his way;" and to further publish it, defendant cut the item concerning the plaintiff out of the paper, pasted it upon a postal card and sent it through the post-office to a young lady in Minneapolis to whom plaintiff was engaged to be married. Defendant meant by the publication that the plaintiff was an absconding debtor, and a dishonest person not entitled to the confidence and respect of the community.

Defendant contends that the complaint does not allege facts sufficient to constitute a cause of action. We do not think the words published come under the third class in the classification given in *Pratt v. Pioneer Press Co.*, 30 Minn. 41, i. e., of words clearly defamatory on their face. For the only facts suggested by their standing alone—to wit, that the plaintiff owes a drug bill and that the creditor wishes him to pay—do not necessarily impute any thing wrong to plaintiff. But words which may be innocent of themselves may be rendered libellous by the place and circumstances of their publication, for such place and circumstances may impress on them a meaning and suggestion which standing alone, they do not have. Thus, though the words here do not of themselves impute wrong, they might be published in such a place or under such circumstances as to make them capable of naturally conveying the impression that plaintiff had been guilty of dishonest practices, either in contracting the debt or in withholding payment of it. And so they come under the second class mentioned in the case referred to, of words reasonably susceptible of a defamatory as well as of an innocent meaning. What meaning they would naturally convey was for the jury to determine in view of the circumstances of their publication. In this respect the case is similar to *Woodling v. Knickerbocker*, 31 Minn. 268.*

Although the publication of the words alleged is admitted in the answer, it was proper for plaintiff to put the number of the newspaper in evidence to show the circumstances of their publication, the allegations of which in the complaint are to some extent denied

*There the words, placarded on furniture on a sidewalk, were, "taken back from W., who could not pay for it; to be sold at a bargain. Moral, beware of dead beats." —REPORTER.

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by the answer. It was proper for the jury to see from the newspaper itself among what character of items defendant had caused his item to be placed; what company he had chosen for it.

And here we will notice what defendant claims as to the evidence. He insists that (as the evidence shows) he did not know of the other matters to be published in the newspaper, and that he gave no direction as to the place or mode of publication. It is apparent however that defendant knew, at least in a general way, what sort of publication the newspaper was; what sort of items were to be inserted in it. Giving to the publisher this item to be inserted, without directing in what part of the paper it should be placed, was authorizing the publisher to place it in any part he should choose, and the defendant is responsible for the choice of place as though he had made it personally.

At the trial defendant objected to the introduction of the postal card as incompetent, and that defendant had not been in any way connected with it. There was no evidence that defendant sent it or caused it to be sent. The original is not returned here, only a written copy. It is proper to assume, the contrary not appearing, that the slip pasted on the card appeared to be - bore some evidence on its face that it was - defendant's item, cut from a number of the issue of the newspaper in which he authorized it to be placed; that it was of his publication. Sending it upon the postal card to the young lady was only a further publication of it; an extending of the publication made by defendant. Now although one who publishes a libel is not to be held responsible for an independent wrong done by a third person, though connected with the libel, he is responsible for the natural consequences of his own wrongful act, although the wrongful act of a third person may concur in bringing about such consequences. If it were a natural consequence of defendant's publication through the newspaper that some evil-disposed person should send a copy of the paper, or the item cut from the paper, to some one whom defendant had not thought of its reaching, he would be liable for it as the consequence of his own wrong. *Townshend Sland. & Lib.* 158; *Miller v. Butler*, 6 Cush. 71; s. c., 52 Am. Dec. 768. It was for the jury to say whether sending the postal card by a third person was a natural consequence of defendant's publication in the newspaper.

We do not consider the damages excessive.

Order affirmed.

STATE V. DEUSTING.

(23 Minn. 102.)

Statute — "dispose of" — giving away liquors.

In a statute prohibiting the unlicensed sale of intoxicating liquors, the words "disposing of" include giving away.

CONVICTION of unlawfully disposing of intoxicating liquors.
The opinion states the case.

Chas. A. Ebert and John Long, for appellant.

Frank H. Carleton and Judson N. Cross, for State.

VANDEBURGH, J. By section 5, chapter four of the charter of the city of Minneapolis (Sp. Laws 1881, p. 434) it is provided that "for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime," the city council shall have full power and authority to make and enforce all such ordinances "as it shall deem expedient;" "and for these purposes the said city council shall have authority by such ordinances, first, to license and regulate * * * all persons vending, dealing in or disposing of spirituous, vinous, fermented, or malt liquors; second, * * * and to restrain any person from vending or dealing in spirituous, fermented or vinous liquors, unless duly licensed by the city council." The control of the business of vending, dealing in, or disposing of spirituous and other intoxicating liquors is therefore committed to the city council; and persons presuming to vend or deal in the same are subject to the restraint and regulation of the council, which may, by proper ordinance, prescribe the conditions under which such persons may be licensed to sell "or dispose of" such liquors. In pursuance of this authority the ordinance under which this prosecution is brought was passed by the council, by the first section of which it is provided that no person shall sell, vend, deal in, or dispose of any spirituous, vinous, fermented, or malt liquors, * * * within the limits of the city of Minneapolis, without having first obtained a license therefor in the manner herein provided."

It is charged in the warrant that the defendant, at a time and place named, within the limits of the city, did willfully, unlaw-

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fully, and wrongfully dispose of a quantity of malt liquor, to-wit, beer, to one O. H. Peterson," without first having obtained a license therefor, and contrary to the provisions of the ordinance, etc. The defendant pleaded not guilty, and upon the trial it appeared that he was keeping a saloon and engaged in the business of selling liquor without the required license, but that in the instance complained of the malt liquor in question was furnished gratuitously by the defendant.

The court instructed the jury, under defendant's exception, in substance, that if they should find that the defendant was keeping a saloon and was a dealer in or vender of malt liquors within the limits of the city, the word "dispose," as used in the ordinance, covered and forbade the furnishing and delivery to the party named in the complaint, by the defendant, at that place, of malt liquors belonging to defendant, whether he received any compensation therefor or not. In other words, within the intent and meaning of the ordinance there might be under such circumstances an unlawful disposition by gift as well as by sale or barter. The ordinance is intended to reach and suppress the evils arising from the unrestrained sale and traffic in intoxicating liquors within the city, and we are considering it in that aspect solely. It must therefore have a reasonable construction, and such as is best suited to accomplish the purposes arrived at, consistently with the meaning of the language used. *Com. v. Kimball*, 24 Pick. 366; s. c., 35 Am. Dec. 326. In its scope and purpose the ordinance is intended to restrain such unlicensed traffic in any form. The terms "dispose of" are meant to include other forms of disposal than indicated by the preceding words in the ordinance, though consistent with them as respects its intent and purpose. It is evident that in the legislation generally on the subject in the State, such is the construction to be given to these words where used, as will appear on comparing the different sections in Gen. St. 1878, chap. 10, § 164, sub. 2; chap. 10, § 207, sub. 13; chap. 16, §§ 4, 17; chap. 37, § 14; chap. 100, § 24; chap. 124, § 45. These several statutory provisions are all for police purposes, and have a common object; yet in some the words "sell or dispose of," in others the words "sell, give or deal in," "give or deal in," "sell, barter or give," etc., are used, all aiming to suppress the same mischief arising from the unlawful disposition of intoxicating liquors.

The ordinance in question was, we think, framed in this form in

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order to make it more effective as a police regulation. And the giving away of liquor is certainly one method of disposing of it, and in connection with the sale or traffic, is within the mischief sought to be remedied. And the ordinance is intended to be broad enough to secure certainty in its enforcement, and to prevent evasions of its provisions. As remarked by the court in *State v. Adamson*, 14 Ind. 296: "To prevent abuses that might flow from the unrestrained disposal of liquors. * * * it would seem that the giving away, under circumstances which might produce the same evil results as the selling, would be a matter properly regulated in connection with the selling. Indeed it may be regarded as a necessary incident to a statute regulating the sale, to secure its sufficient operation. * * * All experience under license laws proves this." The instruction given the jury by the court was therefore proper, upon the evidence in the case.

We have carefully considered the arguments of the learned counsel for the defendant, but we are unable to discover any substantial ground for a new trial. The order denying a new trial must therefore be affirmed.

Order denied.

HATFIELD V. ST. PAUL AND DULUTH RAILROAD COMPANY.

(33 Minn. 130.)

Trial—compelling plaintiff to walk.

On the trial of an action for personal injuries, the uncontradicted proof showing that since receiving them the plaintiff walked lame, the court commits no error in refusing to compel him to walk across the court room in presence of the jury.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

James Smith, Jr., and I. V. D. Heard, for appellant.

C. D. O'Brien, for respondent.

MITCHELL, J. 1 We have examined all the evidence in this case and are of opinion that it justified the verdict.

*See *White v. Milwaukee R. Co.* (61 Wis. 536), 50 Am. Rep. 154, and note, 156.

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2. The plaintiff, while leaving defendant's cars, fell or was thrown from the platform or steps of the car upon the ground, injuring the sciatic or great nerve of the thigh. The plaintiff as a witness in her own behalf testified that this had caused her great and constant pain, and had caused the thigh to shrink, and had rendered her lame and caused her to "limp" in walking. The counsel for defendant requested the court to direct her to walk across the court-room in presence of the jury, which the court declined to do, to which refusal defendant excepted.

As the object of all judicial investigations is if possible to do exact justice and obtain the truth in its entire fullness, we have no doubt of the power of the court in a proper case to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. *Line v. Taylor*, 3 Fost. & F. 731; *Lewis v. Hartley*, 7 Car. & P. 405. The practice in patent and in certain equity cases of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases.

It is a common practice to allow plaintiffs in actions for personal injuries to exhibit to the jury their wounds in order to show their extent, or to enable a surgeon to demonstrate their nature and character. This has been held proper. *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370. If for these purposes a plaintiff may exhibit his injuries, there would seem to be no reason why, under proper circumstances, he may not be required to do the same thing for a like purpose upon request of the defendant. In some cases it has been held that a party may be required to submit to an examination by competent professional men, for the purpose of ascertaining the nature and extent of his injuries. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375; *Atchison, etc., R. Co. v. Thul*, 29 Kans. 466; s. c., 44 Am. Rep. 659. From analogy to such cases, we conclude that a court has the power in a proper case and under proper circumstances to direct the plaintiff to do a physical act in presence of the jury that will illustrate or show the charac-

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ter of his injuries. And we are by no means prepared to say that there may not be circumstances where the defendant would have a right to such an order. But it is evident from the very nature of things that the propriety of such an order must usually rest largely in the discretion of the trial court, and it would only be in case of a plain abuse of such discretion that we would interfere.

In the present case we think the court very properly refused to direct the plaintiff to exhibit herself to the jury and bystanders by walking across the room. Such an act would have furnished the jury little or no aid in determining the extent or character of her injuries. The only fact it could by any possibility have determined was whether or not she was lame or "limped," as she testified, in walking. But there was already ample and uncontradicted evidence of this fact. Her own evidence on the point was fully corroborated by that of three or four other witnesses, her neighbors or members of her family, who had seen her almost daily since the accident.

Order affirmed.

GREELEY V. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

(33 Minn. 133.)

Railroad — fencing station grounds.

A railroad company is not relieved from the duty of fencing and making cattle-guards at a wagon-crossing by the facts that it is in the company's yard in a city and it would be inconvenient to do so. (*See note, p. 19.*)

ACTION for killing a horse. The opinion states the case. The plaintiff had judgment below.

R. B. Galusha and J. Kling, for appellant.

Wm. Louis Kelly, for respondent.

MITCHELL, J. The statute reads: "All railroad companies in this state shall * * * build or cause to be built, good and sufficient cattle-guards at all wagon crossings, and good and substantial fences on each side of such road. All railroad companies shall be liable for domestic animals killed or injured by the negligence

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of such companies, and a failure to build and maintain cattle-guards and fences as above provided, shall be deemed an act of negligence on the part of such companies. Gen. St. 1878, chap. 34, §§ 54, 55.

1. The first contention of defendant is that this statute has no application within the limits of an incorporated city or village. There is certainly no such exception to be found in the statute, and if we consider the evil and danger against which the legislature intended to provide, there is no reason why the requirements of the act should not apply within cities and villages as well as in the country. It is not for the court to nullify by construction the plain and explicit requirements of the statute. *Cleveland & P. R. Co. v. McConnell*, 26 Ohio St. 57; *Bruce v. N. Y. C. R. Co.*, 27 N. Y. 269; *Bradley v. Buffalo, etc., R. Co.*, 34 N. Y. 427; *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Flint, etc., Ry. Co. v. Lull*, 28 Mich. 510. We find no authority to the contrary, except in those States where incorporated towns and villages are, in terms, excepted by the statute. These of course are not in point.

2. The second assignment of error is the refusal of the court on the trial to allow the defendant to prove by its road-master "that there would have been difficulty in fencing and putting in cattle-guards there," and "that the point at which the horse wandered upon the track was within the yard limits of the defendant's road, and at that point it would have been impracticable to erect cattle-guards." This offer, as we construe it, does not contemplate any attempt to prove that the defendants had not the legal right to fence this part of its road, or to put in cattle-guards at this street crossing, or that this "yard" was a public place used or required to be used by the public in transacting business with the company, or that any public convenience or necessity required that it should be left open. With the offer in this form it is to be assumed that the difficulty and impracticability proposed to be proved have reference solely to the convenience of the company. But inconvenience to the company will not relieve it from obeying the law. *Bradley v. Buffalo, etc., R. Co.*, *supra*.

Of course this statute must be construed in the light of other provisions of law against obstructing streets, highways and public grounds. Hence a statute like this, which in general terms imposes this duty on a railroad company, is always construed as allowing an exception where the company has no legal right to do

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the act. It does not require them, for example, to build a fence in a public street or other public grounds.

There is another exception implied as to places required to be left open by the public necessity or convenience, such as grounds about stations which are used for entrance or exit of passengers, or the receipt or delivery of freight; but this public convenience is the limit of the exception. This is as far as even the cases from Iowa and Indiana relied on by defendant go when carefully examined. In *Davis v. Burlington & M. R. Co.*, 26 Iowa, 549, in which the court held that the company was not bound to fence its "depot grounds," they place their decision upon the ground that these were required and used for loading and unloading freight and all the purposes incident to a station, and hence that public convenience required that they be left open. They expressly say that mere inconvenience to the company has little if any weight; that they look rather to the public convenience and public interest. That they did not intend to extend the exception beyond this is evident from a subsequent decision, in which they held that the space used for switches or side-tracks adjacent to the station was not necessarily within the exception. *Comstock v. Des Moines V. R. Co.*, 32 Iowa, 376. See also *Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250. It may also be suggested that the court laid special emphasis on the peculiar phraseology of the Iowa statute.

In Indiana the court seems to have viewed some provisions of their statute as penal, and hence was inclined to construe it somewhat strictly. Yet in *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471, the court say that while the statute has no application to points "where it would be illegal or improper that the road should be fenced, such as the crossings of streets or alleys in a city or town, * * * or at mills, etc., where public convenience requires the way to be left open," yet that this is the limit of the exception.

This was followed in *Jeffersonville, etc., R. Co., v. Parkhurst*, 34 Ind. 501, and is approved in *Flint, etc., Ry. Co., v. Lull*, *supra*. See also *Wabash Ry. Co. v. Forshee*, 77 Ind. 158, and *Robertson v. Atlantic & P. R. Co.*, 64 Mo. 412.

In *Pierce on Railroads*, 420, 421, the rule is stated thus: "A statute which in general terms imposes on the company the duty to fence is construed as allowing exceptions required by the public necessity or convenience," and hence that it is not required to fence its road across a highway, or "to inclose the grounds about

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its stations for freight or passengers, which are required to be kept open for public convenience."

Thompson, in his work on Negligence, vol. 1, page 521, concludes that the proper test, as deduced from the American cases, of whether a place ought to be fenced, seems to be the fact of its being in law a public place, joined with the fact of its practical use by the public.

The evidence offered by defendant did not tend to bring the case within either of the implied exceptions to the statute. It neither tended to prove that it had no legal right to construct fences and cattle-guards at this place, or that public necessity or convenience in transacting business with the road required that the place should be kept open and unobstructed. As already suggested, the fact that it would be inconvenient for the company to fence of itself creates no exception and will not relieve it from complying with the law. If the statute is too strict or onerous, the remedy is with the legislature. Our conclusion therefore is that there was no error in excluding the evidence offered.

Order affirmed.

NOTE BY THE REPORTER.—A railroad company is not bound to fence where it would interfere with its rights in operating the road or imperil the life of its employees. *Evansville, etc., R. Co. v. Willis*, 98 Ind. 507. So as to station grounds, *Swearingen v. M. K. & T. R. Co.*, 64 Mo. 73. In the latter case the court said: "Such open spaces being assigned for the free use of the public having business with the companies seem to be regarded as in a measure dedicated to public use, and somewhat in the nature of highways, and therefore within the exceptions of the statute. To fence them up in towns and villages would, in the language of this court, in *Lloyd v. P. R. Co.*, 49 Mo. 199, be to 'commit a public nuisance,' to render it inconvenient, if not almost impossible, for the companies to perform the office of their creation."

See *Ohio, Burlington, etc., R. Co. v. Hans*, 111 Ill. 44.

SMITH V. CRANE.

(33 Minn. 144.)

Negotiable instrument — certainty in amount.

A note providing for "interest at ten per cent per annum until paid, seven if paid when due," is not rendered non-negotiable by this provision. (*See note, p. 21.*)

ACTION on a note. The opinion states the case. The defendant had judgment below.

P. A. Foster, for appellant.

Wm. N. Plymat, for respondent.

BERRY, J.

"\$100.

GOOD THUNDER, *July 24, 1882.*

"For value received on or before the first day of January, 1884, I, or we, or either of us, promise to pay to the order of D. M. Osborne & Co. the sum of \$100 at the office of Gebhard & Moore in Mankato, with interest at ten per cent per annum from date until paid; seven if paid when due.

"W. J. B. CRANE."

A negotiable promissory note must be certain as to amount. *Jones v. Radatz*, 27 Minn. 240. It is so certain when the sum to become absolutely payable upon it at any given time is ascertainable upon its face. 1 Dan. Neg. Inst. § 53; *Towne v. Rice*, 123 Mass. 67; *Jones v. Radatz, supra*.

The defendant's position is that the foregoing instrument is rendered uncertain as to amount by the interest clause, and therefore is not a negotiable promissory note. As to the legal effect of such a clause the authorities disagree. Some hold that the contract reserves the higher rate of interest, with a provision for its abatement, upon a condition to be performed, and that therefore the difference between the two rates is not a penalty, but the contract is to be enforced according to its literal terms. The cases holding this view rest upon *Nicholls v. Maynard*, 3 Atk. 519. See *Walmesley v. Booth*, Barn. Oh. 478, 481; *Bonafous v. Rybot*, 3 Burr. 1370; *Waller v. Long*, 6 Munf. (Va.) 71. Other authorities hold

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that the clause is the same in effect as if it had reserved the lower rate of interest, with a provision that if the indebtedness is not paid at maturity interest shall run at a higher rate. *Seton v. Slade*, 7 Ves. 265; and see *Stanhope v. Manners*, 2 Eden, 197; *Brockway v. Clark*, 6 Ohio, 45; *Longworth v. Askren*, 15 Ohio St. 370; *Brown v. Barkham*, 1 P. Wms. 652. If this be the true construction of the clause it is generally agreed that the difference between the two rates is to be treated as a penalty. *Talcott v. Marston*, 3 Minn. 238 (339); *Newell v. Houlton*, 22 Minn. 19, and cases last cited.

In our opinion the view taken by the authorities last mentioned as to the legal effect of the interest clause under consideration is the more sensible, and most in accordance with what would seem to be the real object of the parties to the contract. What the payee really wants is his money at the due date of the contract, and to secure this he holds an increase of the rate of interest over the debtor's head. In other words the increase is a penalty for the debtor's delinquency. Treating the increase as a penalty it follows, under the decisions of the court before cited, that the note in suit will in law draw the same rate of interest before as after maturity; that is to say, seven per cent, and that therefore (whatever might be the case if the interest clause were upheld according to its literal terms) the sum absolutely payable upon the instrument at any given time is thus made certain as the principal and seven per cent interest.

[Minor point omitted.]

Order reversed and new trial directed.

NOTE BY THE REPORTER.—In *Davis v. Rider*, 53 Ill. 416, the note was payable “with twenty-four cent per annum after maturity, as compensation and damages for non-payment.” Held, valid. In *Bane v. Gridley*, 67 Ill. 388, the provision was, “if not paid promptly at maturity, thirty per cent. per annum thereafter as liquidated damages for non-payment. The court said: ‘This case is precisely like *Lawrence v. Cowles*, 18 Ill. 577; *Smith v. Whitaker*, 23 Ill. 867; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Gould v. Bishop Hill Colony*, 35 Ill. 324, and *Davis v. Rider*, 53 Ill. 416. We are not inclined to overturn a rule so firmly settled in this court. It is urged by counsel that the rate of interest which the note was to draw after maturity was a penalty to secure the payment of a smaller sum, and therefore to be relieved against in chancery and not to be recovered at law, and that the cases above cited were decided only in reference to the question of usury. But the court could hardly have decided all these cases without considering both these questions, and evidently did not regard a merely increased rate of interest in consequence of non-payment at maturity as a penalty in the sense in which a gross sum is a

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penalty when it is to be paid because a less sum is not paid at a particular day. In the last case the gross sum becomes due at once, in case of non-payment at the day, and is strictly a penalty, from which a court of chancery will relieve on slight grounds, as in *Tiernan v. Hinman*, 16 Ill. 400, cited by counsel for appellee. But in cases like the one at bar this court has evidently treated the increased interest as merely liquidated damages accruing from day to day, of which the party can at any time relieve himself by payment, and therefore involving ordinarily no special hardship calling for interference by the courts."

See *Riker v. Sprague Mfg. Co.* (14 R. I. 402), 51 Am. Rep. 418, and note, 418.

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(33 Minn. 175.)

Statute of frauds — contract to buy lands, sell, and divide profits.

An oral agreement by which one is to negotiate the purchase of land, and the other is to pay the price and take title, and when the latter shall sell, the profits shall be divided between them, is not within the statute of frauds.

ACTION to recover profits of sale of lands. The opinion states the case. The plaintiff had judgment below.

F. Hooker and Shaw & Cray, for appellant.

Snyder & Jameson and Hart & Brewer, for respondent.

GILFILLAN, C. J. As the facts are found by the court below — and the evidence of the plaintiff taken as a whole justifies the finding — the plaintiff in 1871 ascertained that a certain piece of land in Minneapolis could be purchased at the price of \$3,000, and orally agreed with the defendant that he would negotiate the purchase of the same at that price for defendant, the defendant to pay the purchase-price and take a conveyance of the land, and that when defendant should sell the land, the profits (the defendant being allowed interest at the rate of twelve per cent per annum upon the price paid by him) should be divided equally between them. The purchase was so made, the land conveyed by the vendor to defendant, and upon a sale by him some years after, a large profit was made after allowing said twelve per cent. This action is brought to recover one-half of such profit.

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This agreement is not within the statute of frauds. It manifestly did not contemplate that plaintiff should have any estate or interest in the land or be interested in any way in the transaction, unless upon a sale there should be a profit, and then only in the profit, and to the extent of only one-half thereof. If there should be no profit he would get nothing. If there should be a loss he would lose only his time and trouble in making the purchase. The agreement was rather one of employment or agency than for an interest in real estate. In a great many cases similar oral agreements have been held to be valid, and we find no decision to the contrary. See *Trowbridge v. Wetherbee*, 11 Allen, 361; *Bunnel v. Taintor*, 4 Conn. 568; *Harben v. Congdon*, 1 Cold. 220; *Benjamin v. Zell*, 100 Penn. St. 33; *Gwaltney v. Wheeler*, 26 Ind. 415; *Bruce v. Hastings*, 41 Vt. 380; *Heyn v. Philips*, 37 Cal. 529; *Lesly v. Rosson*, 39 Miss. 368. No trust in respect to the profits existed other than such as arises upon the receipt by one of money which he has agreed to pay on such receipt to another.

On the trial plaintiff introduced against defendant's objection that it was incompetent, what purported to be a memorandum of the transaction made by him in a book of defendant. Plaintiff testified that he made it in the presence and at the request of defendant. If that was so, and the question was one of fact, the memorandum was the act of defendant as much as though he had made it with his own hand, and consequently was evidence against him.

Order affirmed.

 NOONAN V. CITY OF STILLWATER.

(33 Minn. 198.)

Constitutional law — defective sidewalks — liability of owner.

A city charter provided that the owners of land on streets should construct and maintain sidewalks, and further that they should be liable to all persons injured by their failure to keep them in repair and safe for travellers. *Held*, that the latter provision was unconstitutional so far as it imposed a liability to others than the city.*

*See *Heeney v. Sprague* (11 R. I. 456), 28 Am. Rep. 502; *Flynn v. Canton Co.* (40 Md. 812), 17 Am. Rep. 608, and note, 616. See also *Bott v. Pratt*, *post*; *City of Hartford v. Talcott* (48 Conn. 525), 40 Am. Rep. 189.

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ACTION against the city and a lot owner for personal injuries by defective sidewalk. The opinion states the case. On demurrer, the defendant, the lot owner, had judgment, and the plaintiff had judgment against the city.

A. E. Macartney, for the city.

Fayette Marsh, for defendant Gray.

GILFILLAN, C. J. The charter of the city of Stillwater (Sp. Laws 1881, chap. 92, subd. 8, § 13, p. 571) makes it "the duty of all owners of land adjoining any street, lane or alley in said city to construct, reconstruct and maintain in good repair such sidewalks along the side of the street, lane or alley next to the lands of such owner, respectively, as may have been heretofore constructed, or as shall hereafter be constructed or directed by the city council to be built, and of such material and width, and upon such place and grade as the city council may by ordinance or otherwise prescribe." It also provides that such owners shall be liable for all damages to whomsoever resulting from their fault or evident neglect in not keeping any such sidewalk in good repair, and in safe, passable condition; and that no action shall be maintained against the city by any person injured through a defect in any sidewalk, unless the owner of the land along which such sidewalk is defective is joined as a defendant; and that in case of judgment against the defendants execution shall first issue against the defendant owning the land.

The plaintiff having been injured through defects in a sidewalk upon a public street in the city opposite a lot owned by the defendant Gray, brings this action. The complaint alleges that the sidewalk was constructed by the city, but in such a way as to be defective and unsafe, and that it is rendered more unsafe by reason of water from natural springs on Gray's lot flowing upon and across and forming ice on it. Each of the defendants demurred to the complaint. The demurrer of the city was overruled, that of Gray sustained. The city appeals from the order overruling its demurrer, the plaintiff from that sustaining the demurrer of Gray.

We can see no reason to question the liability of the city. The charter devolves upon it the custody of and power and control over streets usually devolved upon city corporations. This creates the duty to keep the same in repair when opened by the city for travel,

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and the liability for injuries caused by neglect of that duty. *City of St. Paul v. Seitz*, 3 Minn. 205 (297); *Shartle v. City of Minneapolis*, 17 Minn. 284 (308); *Lindholm v. City of St. Paul*, 19 Minn. 204 (245); *Moore v. City of Minneapolis*, 19 Minn. 258 (300). For this purpose a sidewalk is part of the street. *Furnell v. City of St. Paul*, 20 Minn. 101 (117). The demurrer of the city was therefore properly overruled.

The demurrer of the defendant Gray presents questions of greater difficulty. Can the legislature make it the duty of lot-owners in cities to construct and keep in repair so much of the street to the centre of it as lies in front of the lots, and upon their failure so to do, make them liable, not to the city, but to any one of the public who may be injured in consequence of the neglect to construct or keep in repair? Some cases attempt to make a distinction between the sidewalk and the remainder of the street in respect to the method of laying the burden of constructing and maintaining the same. But there is no basis for such a distinction. The sidewalk and the remainder of the street are equally for public use, the rights of the public are the same in each. The rights, as far as the center of the street, of the owner of an abutting lot are the same in each. That one is reserved for passers on foot, and the other is for the use of vehicles, is only a regulation of the public use for the public good, the public authorities determining how much shall be reserved for sidewalk. The improvement of one is just as much a public improvement, and must have the public need to justify it to the same extent as the improvement of the other; therefore if the provisions of this charter as to sidewalks are valid, the legislature may extend them over the remainder of the street—certainly to the center.

The provisions are clearly an attempt to charge upon the property the cost of a public improvement. Making it the duty of the lot owner, as between him and the city, to construct and keep the sidewalk in repair in front of the lot, the city having the right in case of his default to do the work itself and charge the cost to the lot, does not differ essentially, so far as the principles of taxation for local improvements are concerned, from authorizing the city, and making it its duty in the first instance to do the work and levy on the lot the expense of so much of it as lies in front of it. Whether that is a proper method under our Constitution of apportioning the expense of local improvements to the property charge-

able, that is, whether the expense of a street may be apportioned by charging to each lot the expense of so much of the street to the center as lies in front of it, is the first question to be considered. Whether it is competent for the legislature to impose upon the owner of the lot the liability to third persons attempted in this charter is another question, to be considered after the other.

Upon this first question very little aid is to be got from decisions in other States. As affecting the proper basis or method of apportionment in cases of local improvement, the Constitutions of the several States differ materially. Each court interprets the Constitution of its own State and decides cases involving the question according to its interpretation. We are not now embarrassed by the question that has vexed many courts, whether the power to impose on property the cost of making and repairing streets is to be referred to the taxing power, the police power or some other sovereign power. In *McComb v. Bell*, 2 Minn. 256 (295), this court held it to belong to the taxing power, and this was reaffirmed and applied in *Stinson v. Smith*, 8 Minn. 326 (366). The first question is therefore, is there in the Constitution any limitation or restriction of that power that will prevent the legislature from imposing the cost of such improvements, or the duty as between lot owners and the city to make them in the manner provided in this charter?

The only part of the Constitution which can be claimed to have that effect is section 1, article 9. Originally that section read: "All taxes to be raised in this State shall be as nearly equal as may be; and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State." This laid down the rule that taxes should be equal, and that for the purpose of levying them and preserving equality, the cash valuation of the property to be taxed should be taken as a basis. In *Stinson v. Smith*, *supra*, the court decided that the levying of assessments for local improvements came within the rule and held void an act which authorized such an assessment to be levied on the property benefited in proportion to the benefits resulting thereto, instead of in proportion to a cash valuation. After the decision in that case section 1 was amended by adding: "Provided that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements

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or upon the property to be benefited by such improvements, without regard to a cash valuation, and in such manner as the legislature may prescribe."

It is not to be supposed that in adopting this amendment the people intended to reject or modify, in respect to taxes of this class, so just and reasonable a principle as that they "shall be as nearly equal as may be;" a principle without which the attempt to tax might become practically confiscation. It must be taken therefore that whatever basis of apportionment may be adopted it must include the idea of equality. The amendment does not lay down any rule or basis of apportionment. It points out what property may be included in what may be termed the assessment or taxing district, to wit, "the property fronting upon such improvement," or "the property to be benefited by such improvement." But it permits the legislature to adopt some other consideration than the cash valuation in determining how the cost of local improvements shall be apportioned upon the property within the assessment district. Experience had shown that while, for the purpose of general taxation, value is the fairest basis for apportionment, it may not be so for the purpose of paying the cost of local improvements. Thus of two lots equally benefited by the improvement, one might by reason of buildings, or other improvements upon it, be worth many times as much as the other, and on the basis of valuation be taxed for many times as much. This, if the special benefit conferred is to be considered, would result in inequality. This, we have no doubt, was the reason for rejecting valuation as the sole constitutional basis for taxing in such cases, and it seems to have been thought that any general method of apportionment prescribed in the Constitution might not work well in all cases, and for that reason it was better to leave the apportionment to be made "in such manner as the legislature may prescribe."

There is no reason therefore why the duty and cost of making improvements shall not be imposed in the manner provided in this charter unless it has the vice of inequality, so that the court must say that the constitutional principle of equality has been violated. And when we speak of equality under a rule for taxation, it must not be understood that absolute mathematical equality in its operation upon all persons or property is required. No general rule ever was or can be devised for levying taxes, whatever their kind, that might not in exceptional instances operate unequally. To

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condemn the rule it is not enough that under it there may be such cases. If it be one which will generally, and unless with accidental exceptions, apportion the burden justly or with such approximate justice as is usually attainable in tax cases, it must be sustained. Applying this as the test we do not see how the provision in the charter violates in this respect the constitutional requirement. It may in some instances impose more of the general burden upon one than upon another. So might any other rule of apportionment that could be adopted for such cases. We cannot see that as a general rule this will apportion the burden less equally than any other.

The provision of this charter, imposing upon owners of lots a liability to third persons, can hardly be supposed to be for the purpose of putting such owners in the place of the municipal corporation in respect to its control over and care of public streets, its duty, governmental in its character, to the public in that behalf, and its liabilities consequent upon a default in that duty. The owners have no power to regulate the use by others of the sidewalks, nor do they determine where, when or how sidewalks shall be laid. If the council does not direct sidewalks to be laid, or directs them to be constructed in an improper manner or on an improper grade, of improper materials or of an insufficient width, they are in no way responsible. The liability is not imposed on all owners alike, but only on those who neglect to construct sidewalks when directed by the council, or to keep them in repair after they are constructed, and only because of such neglect. If it were an attempt to impose on private persons duties that inhere in the public in their organized, municipal, governmental capacity, it would certainly be an anomaly in legislation. But the liability is rather in the nature of a penalty to enforce performance of a duty imposed as a tax, just as a direct pecuniary penalty is very generally provided to enforce payment of necessary assessments for local improvements.

Treating the imposition upon lot-owners of the duty to construct and maintain sidewalks as a mode of apportioning to the property its share of the common burden, as a mode of taxation — and it can be sustained on no other theory — and the liability as a penalty to enforce what is in effect a tax, we are brought to the question of how, or rather upon what property the tax may be made a burden, and against what property it may, with the penalties, be enforced;

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for the penalty, being but an incident to the tax, must be subject to the same qualifications as the tax itself. Thus the rule of uniformity must be observed with respect to the penalty as well as with respect to the tax. Also if enforcement of the tax must be limited to particular property, enforcement of the penalty must be subject to the same limitation. It would be absurd to say that a tax could be enforced only against a particular lot on which it is a burden, but that the penalty for non-payment of it might be enforced against any other property of the owner. A tax imposed like this, without regard to a cash valuation, cannot be sustained by the general clause of the section of the Constitution we have referred to. It must find its support in the proviso, and can be imposed only as therein provided. That empowers the legislature to authorize the levy of assessments for local improvements, without regard to a cash valuation, "upon the property fronting upon such improvements, or upon the property benefited by such improvements." It specifies the particular property or class of property upon which the burden may be laid, as well as the purpose for which it may be laid, and thus excludes the power to lay it without regard to a cash valuation, for any other purpose or upon any other property of the owner, or upon the owner generally, so as to make it a personal obligation which may be enforced by a personal action against his property generally. This is in accordance with the general theory of taxation, that the property which is to be benefited by the disbursement of the tax should pay it. It is especially the theory of assessments for local improvements. Where a public improvement is in its character local, it is assumed, and correctly, that although it may be a general incidental benefit to the whole public, it is a direct, special and peculiar benefit to property fronting on it, or in its vicinity, and therefore that property ought to pay for it. What we have said of the power to impose on owners of lots the duty to construct and maintain sidewalks must be understood as of a duty with respect to the particular property to be enforced, not against the owner personally, but against the property.

The liability provided in the charter is one which subjects the owner to a personal action, and for the reasons we have stated it cannot be sustained. The duty to construct and maintain sidewalks being in the nature of a tax, is one that is owing only to the city, just as the duty to pay taxes for local improvements imposed

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in any other way. It is not, and from its very nature cannot be, a duty owing to third persons. In this respect it differs from certain police regulations intended for the protection of each one of the public, such as laws regulating the speed of railroad trains, prohibiting fast driving of horses in the streets, and the like. Now whether it is competent for the legislature to make one liable to private persons for failure in the duty to pay taxes of any kind to the State or municipal corporations, is a very grave question. But I think this case does not call for its decision.

Both orders appealed from are affirmed.

BERRY, J. While agreeing to the final disposition made of this case, and that the proviso quoted from the Constitution does not authorize the legislature to impose upon the owner of abutting property a liability to persons injured through defects in a sidewalk, I prefer to rest my objection to any such imposition upon the ground that it would be an attempt to shift upon the property-owner — a private person — a liability for the failure of the public authorities to perform a governmental duty. While the expense of constructing and maintaining a sidewalk may be imposed upon the property-owner by giving him the option to build and maintain it, or by taxing him for the cost of so doing, this is as far, as it seems to me, as his liability can go.

MITCHELL, J. I am also of opinion that the amendment to section 1 of article 9 of the Constitution, does not authorize the legislature to impose upon the owner of abutting property this liability to persons injured through failure to repair a defective sidewalk, but I rest my opinion substantially upon the grounds stated by my brother BERRY. Ordinances requiring a person to build or keep in repair sidewalks abutting his property are an exercise of the taxing and not of the police power. Hence, the duty imposed by them is one due the city as a municipal body, and not to the public as composed of individuals. The work enforced under them relieves to the extent of its cost and value the city from the charges which otherwise it would be necessarily subjected to in the discharge of its municipal duty of keeping all duly-established streets in good repair so that they may be safe and convenient for persons using them. To this end the cost of constructing and maintaining the sidewalks may be imposed as a tax upon the property-owner;

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and it is immaterial whether this is done by the city doing the work in the first instance or by first requiring the property-owner to do it, and then on his failure to do it, causing it to be done and charging the cost against the property.

But the city is in no degree exonerated by this from its obligation to perform its governmental duty of keeping the public streets in safe condition. In my judgment the power to levy assessments for local improvements does not authorize the imposition upon a property-owner as a penalty for non-payment of his tax or assessment (for that is what his failure to construct or repair amounts to), the liability of guarantor to the public of the safety of the street, or of indemnitor of the city against liability for its neglect of its own municipal duty. This would practically amount to shifting upon private persons the governmental duty which the city owes the public, and compelling every man who owns a lot in a city to turn himself into a street supervisor. I do not think the constitutional provision referred to authorizes the imposition of any such liability either upon a person or his property.

The distinction between this case and one where a person has committed a nuisance in a street, or where he has failed to comply with the requirements of an ordinance enacted in the exercise of the police power, designed for the safety of the public and imposing a duty due, not to the city as a municipal body, but to the public as individuals is too apparent to require more than a reference to it.

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(33 Minn. 289.)

Municipal corporation — liability for action of board of health.

A city is not liable for the acts or negligence of a board of health constituted a separate body by the charter, whether appointed by the legislature directly or by the city in pursuance of the charter.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below on demurrer.

*See *Spring v. Inhabitants of Hyde Park* (137 Mass. 554), 50 Am. Rep. 334; *Gillaly v. City of Madison*, post.

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S. P. Crosby and *W. H. Lightner*, for appellant.

W. P. Murray, for respondent.

VANDEBURGH, J. The plaintiff in this action seeks to charge the defendant for the misfeasance or negligence of the board of health or its agents in leaving a vault upon private premises exposed and open after removing its contents, in consequence of which plaintiff, without fault on her part, fell into the vault and was injured.

By the charter of the city the board of health is constituted a separate body, composed of the city engineer, city physician or health officer, and four members of the city council appointed by the president of that body. Its powers and duties are specially defined by the charter, and it is expressly authorized to make rules and by-laws for the government of the action of the board and its agents in the discharge of its and their duties, and it is made the duty of the police to enforce its sanitary regulations and orders. It is also clothed with authority, within the limits of the city, to enforce all laws of the State generally, relating to the care and preservation of health, and is given jurisdiction over all lakes and water-courses in Ramsey county to the same extent as within the city. City Charter (Mun. Code, St. Paul), chap. 11 (Sp. Laws 1874, chap. 1). The provisions of the charter clearly mark and define the duties of the board as public and general in their character. Sp. Laws 1874, chap. 1, subc. 11, as amended, Sp. Laws 1879, chap. 88; Sp. Laws 1883, chap. 2, § 18.

It is usual, either by general law or in municipal charters, to confer such authority upon local boards of health, to be exercised under the general police power of the State. And it is entirely immaterial, as affecting the question of the nature of the duties devolving upon such board, and the question of municipal responsibility, in what manner the legislature may direct and authorize its members to be appointed.—whether by the corporation or otherwise. *Maxmilian v. Mayor*, 62 N. Y. 160; s. c., 20 Am. Rep. 468; *Fisher v. Boston*, 104 Mass. 87; s. c., 6 Am. Rep. 196.

The charter also contains general provisions authorizing the common council by ordinance to remove and abate nuisances injurious to the public health, and to make regulations for the preservation of health and suppression of disease, and to make and

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enforce quarantine laws. Chap. 4. But it is not alleged or claimed in this case that the board of health were acting under the direction of the corporation in executing or enforcing any regulation in pursuance of which the alleged negligent act or omission occurred, or otherwise than in the exercise of the general discretionary powers conferred on it by the charter.

We are not therefore called on to consider the question of the liability of the municipality when it undertakes in the exercise of its corporate powers the performance of the act complained of, or specially directs or interferes in the premises. It is true the complaint alleges "that the defendant, through the said board of health, caused said vault to be cleansed," etc.; but it is clear, we think, and was so assumed in argument that the agency of the city referred to in the matter was simply its relation to the board of health as defined by the charter, and that the board was in fact acting by virtue of the powers thereby conferred. Chap. 11, § 5 of the charter, under which it appears by the complaint the board proceeded in this instance, provides that "said board may order or cause any excavation, * * * room, building, premises, etc., in said city: "regarded by said board as in a condition dangerous * * * to health, * * * to be cleansed, etc." It is not, we think, to be implied that the city council took any express or affirmative action in the premises to direct the abatement of the nuisance in this case, but that it was done by the board in the ordinary course of its duties.

The question then presented for our consideration is whether the alleged negligence of the board created a corporate liability against the city. The duty is imposed by the legislature upon the board of health, under the police power, to be exercised for the benefit of the public generally. It is one in which the city corporation has no particular interest and from which it derives no special benefit in its corporate capacity. And we think it clear, that as respects an agency thus created for the public service, the city should not be held liable for the manner in which such service is performed by the board. 2 Dill Mun. Corp. § 976 (§ 774), etc. It is bound to discharge its official duty, not by virtue of its responsibility to the municipality, but for the general welfare of the community, and no action will lie against the city for the acts of the board unless given by statute. *Fisher v. Boston, supra*; *Hayes v. City of Oshkosh*, 33 Wis. 314; s. c., 14 Am. Rep. 760; *City of*

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Richmond v. Long, 17 Gratt. 375; *Maximilian v. Mayor*, *supra*; *Ogg v. City of Lansing*, 35 Iowa, 435; s. c., 14 Am. Rep. 499; *Welch v. Village of Rutland*, 56 Vt. 288; s. c., 48 Am. Rep. 762; *Tindley v. Salem*, 137 Mass. 171; s. c., 50 Am. Rep. 289; *Condict v. Mayor*, 46 N. J. Law, 157; *Smith v. City of Rochester*, 76 N. Y. 506; s. c., 44 Am. Rep. 393.

The duties of such officers are not of that class of municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions which could be discharged equally well through agents appointed by the State, though usually associated with and appointed by the municipal body. The nature of the duties as public are the same in either case.

In *Kobs v. City of Minneapolis*, 22 Minn. 159, which we think presents a different question, but which is relied on by the plaintiff, a street commissioner dug a ditch across a street, whereby a large quantity of water was carried over to and upon plaintiff's lot from land opposite, and the city was properly held liable, because there the street commissioner was the agent of the city in the supervision and improvement of streets, with large discretionary power in the premises, and subject to control and removal by the city, and in making such ditch across the street he directly caused the flooding of plaintiff's lot. The responsibility for the care and control of streets belonged to the city, and he was acting for the corporation in the course of his employment in and about the discharge of a corporate duty. The city was bound so to use and control the street as not to injure the property of others. *Oliver v. Worcester*, 102 Mass. 489; s. c., 3 Am. Rep. 485; *Thurston v. City of St. Joseph*, 51 Mo. 510; s. c., 11 Am. Rep. 463.

The cases of *City of Dayton v. Pease*, 4 Ohio St. 89; *Bailey v. Mayor*, 3 Hill, 531; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463, and other like cases, are clearly distinguishable from the case at bar. These were actions for damages resulting from the negligence or unskilfulness of the agents of the corporation in and about the supervision or management of corporate property, or the construction of public improvements under the authority of the municipality in its corporate capacity. The same remark will apply to cases generally where the corporation has directly authorized, participated in or ratified (where for any cause it may lawfully do to) the alleged wrongful acts, or has derived a profit or corporate

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advantage therefrom, though it might not otherwise have been liable. *Deyoe v. Saratoga*, 1 Hun, 341; *Tormey v. Mayor*, 12 Hun, 542; *Dooley v. Kansas City*, 82 Mo. 444; *Murphy v. Lowell*, 124 Mass. 564; s. c., 35 Am. Rep. 381; *City of Toledo v. Cons*, 41 Ohio St. 149. But no such facts appear in this case to qualify the rule of corporate liability, and as between the city and the board *respondens superior* is not applicable.

Order affirmed and case remanded.

TIERNEY V. MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

(33 Minn. 311.)

Master and servant — railroad car-inspector and car-coupler.

A railroad car-inspector and a car-coupler are not fellow-servants. *See (note, p. 45.)*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

J. D. Springer, for appellants.

Lovely & Morgan, for respondent.

VANDEBURGH, J. It is admitted that the defendants jointly owned, maintained, and occupied a yard in common at Albert Lea, where trains were made up to be sent over their respective lines. The respondent had charge of the making up of night trains in the yard and was injured in the course of his employment while coupling cars, at about 3 o'clock in the morning of November 24, 1882. A freight train had previously arrived from Minneapolis over the Minneapolis & St. Louis road, including, with others, a box car loaded with flour at that place and bound east. On its arrival it became plaintiff's duty, according to the usual course of business, to obtain a list of the cars and their destination, so that he might proceed to make the necessary transfers in making up the outgoing trains. It was the duty of the car inspectors, two of whom were employed for night service, to inspect all cars in trains on their arrival. The plaintiff had been in the employ of defendants a little

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more than two weeks, and must have been familiar with the manner in which the business was carried on in the yard. On the night in question, about half an hour after the arrival of the train mentioned, the plaintiff, who had been switching and distributing cars, brought an unloaded flat car from the wood track to the main track, upon which the box car we have referred to still stood, and undertook to couple them. His evidence tends to show that as he went to make the coupling, and while the cars were coming together in the usual way, the draw-bar of the flat car struck and overrode the draw-bar of the box car, which appeared to be loose and insecurely supported, and dropped down when struck by the approaching car, thus permitting the two cars to come together and intercept the plaintiff, and resulted in his being run over upon the track, and in causing the loss of a leg, which was necessarily amputated above the knee.

1. While it may be conceded, for the purposes of this case, that from the circumstances and nature of plaintiff's employment in which cars from many roads were brought together with coupling attachments of different heights and patterns he would assume the ordinary risks of the service from such causes, we think, upon the evidence, the question was fairly for the jury whether the accident occurred from such causes or from the fact that the draw-bar of the box car was insecurely supported and in an unsafe condition, from neglect to repair the same. Upon this issue the evidence in plaintiff's behalf among other things also tended to show that the strap or carrying-iron which supported the draw-bar was worn, weak and loose, and that some of the bolts which were intended to keep this iron strap in place were loose or broken, that it had been out of repair for a considerable time, and the defects were such as could readily be discovered by proper inspection.

2. The evidence of the defective condition of the car, which appears to have been previously in the possession of one of the defendants, the Minneapolis & St. Louis Company, at Minneapolis and during its transit to Albert Lea, a distance of one hundred and eight miles, was received and submitted to the jury without any objection or suggestion that the liability did not attach equally to both defendants for any negligence in respect to this car prior to its arrival at Albert Lea. This point is now suggested for the first time; but we think under the circumstances, the attention of the court should have been called to this matter when the evidence

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was received or when the jury were instructed. As the case stands, since we think there was evidence for the jury tending to show a joint liability for negligence in the yard at Albert Lea, it is too late to raise the question in this court as to the competency or sufficiency of the evidence of previous negligence to charge the defendants.

3. Evidence was received under the defendant's exception, showing a regulation of defendants in relation to the inspection of cars, under which it became the duty of the car inspectors, if any were found defective or in need of repairs, to mark them so as to indicate that they were in bad order and hence not to be sent out, but to be sent to the repair track. We think this evidence was properly received upon the question of defendants' liability, for if the car in question was defective and unsafe, which as we have seen was for the jury, then such regulation was binding upon the inspectors as representing the defendants for the protection of employees in the yard, unless it should appear that it was one of the risks of the service assumed by them to handle cars there without regard to inspection, or their condition, or any notice thereof. It may have been a question for the jury, under proper instructions, to determine whether or not, from the nature of the service in which the plaintiff was employed, he was required to proceed to switch cars and make up trains without regard to inspection, and without waiting for it; but instructions of this character were not asked or given, and the evidence does not show that such risk necessarily attached to the plaintiff's business and was hence assumed by him.

The position taken by defendants' counsel at the trial appears to have been that the plaintiff did not give the inspectors the necessary time to complete their work, and the case was submitted to the jury under instructions given at defendants' request that "if he did not do so," or "if he did not know or have reason to believe that all the cars in said train were inspected before he caused them to be moved, he cannot recover." This question was determined by the jury in plaintiff's favor upon the evidence.

As before remarked it was the duty of the inspectors to examine cars immediately upon their arrival, and the evidence tends to prove that it was their practice to so inspect them upon the track before their removal. The inspection of this train was in fact so made on the night in question. There is some conflict in the testi-

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mony as to the length of time it would take to properly inspect such a train of cars, and it does not clearly appear how much time had elapsed before the injury, the plaintiff's recollection being that it was from twenty-five to forty minutes. But it appears that the inspectors had in fact completed their work before the accident. The negligence of the inspectors was therefore proper to be considered upon the question of the defendants' liability. If it is the duty of the corporation to exercise reasonable diligence to supply suitable and safe instrumentalities for the use of its servants to work with, it is also its duty to use like diligence to keep the same in proper repair. This necessarily involves inspection and examination as incident to the obligation to repair, and as a corporation must necessarily act through agents, the negligence of its employees in the discharge of such duty is attributable to the corporation. *Solomon R. Co. v. Jones*, 30 Kans. 601; *Atchison, etc., R. Co. v. Holt*, 29 Kans. 149; *Brann v. C., R. I. & P. R. Co.*, 53 Iowa, 595; s. c., 36 Am. Rep. 243; *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66, 77, 78; s. c., 36 Am. Rep. 454; *Chic. & N. W. Ry. Co. v. Jackson*, 55 Ill. 492; s. c., 8 Am. Rep. 661; *Condon v. Missouri Pacific Ry. Co.*, 78 Mo. 567; *Crispin v. Babbitt*, 81 N. Y. 516; s. c., 37 Am. Rep. 521; *Fuller v. Jewett*, 80 N. Y. 36, 52; s. c., 36 Am. Rep. 575; *Kirkpatrick v. N. Y. C., etc., R. Co.*, 79 N. Y. 240; *Slater v. Jewett*, 85 N. Y. 61, 70; s. c., 39 Am. Rep. 627; *Durkin v. Sharp*, 88 N. Y. 227; *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146, 152; s. c., 42 Am. Rep. 240; *Dana v. N. Y. C., etc., R. Co.*, 92 N. Y. 639; *Vosburgh v. L. S. & M. S. R. Co.*, 94 N. Y. 374; s. c., 46 Am. Rep. 148; *Kain v. Smith*, 25 Hun, 146; *Wedgewood v. Chic. & N. W. Ry. Co.*, 41 Wis. 478, 483; s. c., 44 Wis. 44, 48, 49; *Smith v. Chic., etc., Ry. Co.*, 42 Wis. 520, 526; *Richardson v. Great Eastern Ry. Co.*, 1 Com. Pl. Div. 342; s. c., 17 Eng. R. 293.

In *Fuller v. Jewett*, *supra*, it is said by the court (p. 53): "The duty of maintaining machinery in repair for the protection and safety of employees is the same in kind as the duty of furnishing a safe and proper machine in the first instance;" and "in respect to such act or duty the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury." This corresponds to the language of the same court (CHURCH, C. J.) in *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, 553; s. c., 13 Am. Rep. 545, and FOLGER, C. J.) in *Slater v. Jewett*, 85 N. Y. 61, 70; s. c., 39 Am. Rep.

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627. Substantially the same doctrine is adopted by this court in *Drymala v. Thompson*, 26 Minn. 40, and we think that case must control the disposition of the question under consideration. In some States the courts hold that this rule is not applicable to subordinate employees, as in the case of ordinary car inspectors at the transfer yards, but that the latter are to be deemed fellow-servants of other employees injured through their negligence. *Railroad Cos. v. Webb*, 12 Ohio St. 475, 494; *Little Miami R. v. Fitzpatrick*, 42 Ohio St. 318; *Smoot v. Mobile & M. Ry. Co.*, 67 Ala. 13. The rule adopted in these and other cases is followed in *Smith v. Flint & P. M. Ry. Co.*, 46 Mich. 258; *Mackin v. Boston & A. R. Co.*, 135 Mass. 201; s. o., 46 Am. Rep. 456, as applied to foreign cars in transit, which a railway company is obliged by law to draw over its line. In the case last cited the court say by way of explanation (p. 206): "However it may be as to other cars, the inspectors must be deemed to be engaged in a common employment as to such cars while in transit and until ready to be inspected for a new service." One reason given is that the company was not obliged to repair such cars. That question we need not consider in this case. This car was loaded at the terminus of the line, and by defendants' own regulations was required to be inspected, and if damaged to be properly marked to indicate that fact at its general yard at Albert Lea, by the agents of the defendants appointed for such purpose.

It is difficult to lay down a general rule which will be applicable in practice and define accurately the limits of the master's liability in this class of cases. But if the special duty and responsibility belong to the car inspector to examine and determine whether a car is unfit for service, and shall be so marked and sent to the repair track or shop, it is difficult to discover any distinction in kind between his duty and that of the mechanics who make the repairs. It will also be borne in mind that the measure of liability on the part of the company is reasonable care, which must be determined by the circumstances in each case. Experience in the competent and practical management of railroads will naturally determine the nature and frequency of inspections which ordinary care would require should be made between the intervals of the more minute examinations at the general repair shops. But the general examinations which experience has shown practicable and necessary to be made of cars at the yards designated for such purpose, without

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causing undue delay while in the course of transportation, would at least include such patent defects as would be readily discoverable upon inspection by a competent person in the exercise of reasonable care. *Richardson v. Great Eastern Ry. Co., supra.*

In respect to patent defects in the coupling apparatus, brakes, wheels, etc., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule also there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of the switchman, brakeman, or other operative. *Wedgwood v. Chic. & N. W. Ry. Co.*, 44 Wis. 41; *Schultz v. Chic., etc., Ry. Co.*, 48 Wis. 375. The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees unless maintained in a safe condition, and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities. Placing and keeping such machinery upon the road in actual use would be an assurance to ordinary servants that the same is fit and safe, in so far as the exercise of reasonable diligence could make it. *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146, 152; s. c., 42 Am. Rep. 240. So in the matter of separating damaged cars from those remaining in use with a view to repairs, the cases proceed upon the principle that enough must have been done by the master to indicate, in conformity with some proper regulation or usage of the company, the condition or character of such cars for the protection of employees who are to handle them. *Flannagan v. Chic. & N. W. Ry. Co.*, 50 Wis. 462, 471; *Watson v. H. & T. C. Ry. Co.*, 58 Tex. 434; *Fraker v. St. P., M. & M. Ry. Co.*, 32 Minn. 54. And the rule that the corporation is bound to know the defective condition of its cars within a reasonable time is in harmony with the doctrine that the agents charged with a special duty of looking after and repairing its cars and machinery, *pro hac vice* represent the master.

As before stated this case does not, we think, differ in principle from *Drymala v. Thompson, supra.* There the negligence of the section foreman engaged in repairing the track, who would have otherwise been deemed a fellow-servant with the injured party, was held to be that of the defendants, and it would have constituted

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no defense that the company had employed competent men, adopted proper regulations, or provided suitable materials, and an adequate system for supervising and repairing its track. On the other hand, in *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162; s. c., 38 Am. Rep. 285, a road-master engaged with the injured party in operating machinery was held not to represent the company. It is the kind of service, not the grade, which distinguishes these two cases. The one related to maintaining safe instrumentalities, the other to the use of them.

The application of the rule as well as the question of the degree of risk assumed by the employees, will of course be largely influenced by the special circumstances of any particular case. And so as to different kinds of business, the amount of care required, and the system to be adopted and carried out are to be determined by the circumstances of each case, depending upon the nature of employment, the extent, hazard and usages of the business, the kind of machinery used, and the risks incident thereto. *Kain v. Smith*, 25 Hun, 146.*

[Omitting minor points.]

Order affirmed.

MITCHELL, J., *dissenting*. As I understand the facts of this case, the duty of these "car inspectors" was simply to make a general cursory examination of cars *en route*, upon their arrival at the yard so as to detect any patent defects. Their duty was substantially the same as that of local examiners, employed at certain intervals along the line of every railroad, who make a like cursory examination of the cars of a train in transit. They are ordinary servants of the company, intrusted with no general control or discretion in the management of the company's business or any department, but simply charged with the performance of certain special executive duties in the matter of such local inspection. I think they were mere fellow-servants with those employed in running the trains or moving the cars.

There is much difference of opinion as to whether the doctrine of "common employment" works equitably, as applied to the large business enterprises of the present day, with their numerous departments and different grades of service. But the doctrine has become too thoroughly imbedded in the jurisprudence of England and

* Affirmed 89 N. Y. 875.

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this country to be disturbed by the courts. If it is to be changed, it must be by the legislature. It seems to me that the doctrine laid down in the opinion of the court in this case, if carried to its logical consequences, goes a long way toward breaking down this well-established rule which exempts the master from responsibility for injuries to his servants caused by the negligence of their fellow-servants. This doctrine has been so much and so often considered in the books that it would be useless to enter upon any general discussion of it at this time. But it seems to me that confusion has sometimes arisen from a misapprehension or misapplication of certain maxims or rules bearing upon this subject.

It is often remarked that as corporations can only act through natural persons, who are all in a sense servants of the corporation, to hold general agents or superintendents, to whom is intrusted the management and control of its business, to be fellow-servants with all subordinate employees, would be to relieve the corporation of all liability for negligence. It seems sometimes to be inferred from this that a different rule as to such liability is to be applied to corporations from that applied to natural persons. I do not so understand it. In every business there must be some natural person to whom its management and control is intrusted, and who is therefore, if not the master in person, the representative of the master, and for whose acts the master is responsible. If a natural person intrusts the control and management of his business to an agent such agent is the *alter ego* of the master precisely as if the same thing be done by a corporation. The only difference is that in that case of a corporation there must be such a representative, whereas in the case of a natural person there may not be, for he may manage his own business in person. But it seems to me that in either case, when the relation of the employee to the business and the master is the same, the same rule must be applied in determining whether he is the representative of the master or merely a fellow-servant as to other employees.

Again, a familiar rule is that the master is bound to use ordinary care in furnishing suitable and safe instrumentalities for the use of his servants. Included in this is that of maintaining them in a safe condition. Repairing is in a sense furnishing. And as necessarily incident to the duty of "maintaining" is the duty of providing an adequate system of inspecting, examining and guarding these instrumentalities. It is also the rule that this duty of fur-

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nishing and maintaining safe instrumentalities is a primary duty of which the master cannot relieve himself by clothing some general agent with the power and charging him with the duty of making performance for him, but that the failure of such agent will be the failure of the master. This rule has been sometimes understood as meaning that the master is responsible to his servants for the negligence of every employee, however subordinate his station, who is engaged in performing the most common executive duties in the matters of repairing, examining or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or *alter ego* of the master, and one who simply performs what may be termed mere executive details.

Of course in the multitude of cases on this subject with which the reports abound, often conflicting, and frequently not well considered, some authority can be found for almost any proposition. But I have not found any case well considered, either upon principle or upon an examination of the authorities, which seems to me to carry the rule to any such length. I find no support for it in the English cases. The Supreme Court of Massachusetts, which is one of the few whose decisions on this question are any thing like consistent, or seem to be governed by some uniform principle, has always held the master strictly to the performance of this primary duty of exercising ordinary care in furnishing and maintaining safe instrumentalities for the use of his servants, and refused to permit him to shield himself behind the fact that he had clothed some general agent with the power and charged him with the duty of performing it. This is illustrated by the case of *Ford v. Fitchburg R. Co.*, 110 Mass. 240; s. c., 14 Am. Rep. 598, in which they held the company responsible for the negligence of the master mechanic in not repairing an engine, he having entire charge of that department of the business.

But the distinction which I have alluded to is distinctly brought out in the subsequent case of *Holden v. Fitchburg R. Co.*, 129 Mass. 268, in which the reasons and limits of the rule and the authorities on the subject are ably discussed by GRAY, C. J., and in which it is in effect held that a track repairer and a brakeman are fellow-

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servants. Almost as a corollary from this last decision followed that of *Mackin v. Boston & A. R. Co.*, 135 Mass. 201; s. c., 46 Am. Rep. 486, which holds that a car inspector and a brakeman employed on the same car are fellow-servants — a case entirely analogous to the present one. I have not overlooked the fact that that was a foreign car in transit over the company's road. I also notice the *caveat* in regard to that which the court put into their opinion. But whatever state of facts they might have had in mind in doing so, it could not have been any thing affecting the principle involved in the present case; for it seems to me that this duty of casual inspection of cars while in transit must be the same, whether the car is a foreign one or a domestic one.

In New York the decisions are so often conflicting that the value of any particular one largely depends upon the composition of the court at the time, or the ability of the judge who wrote the opinion. The primary character of the duty of the master to furnish safe instrumentalities is clearly and ably defined by FOLGER, J., in *Lanning v. N. Y. C. R. Co.*, 49 N. Y. 521, 532; s. c., 10 Am. Rep. 417. But the limits to the rule, and the common misapprehension as to its application referred to, are very clearly brought out by ALLEN, J., in *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 573. The distinction between a general agent intrusted with the control of some branch or department of the business, and who therefore represents the master, and a servant employed to perform some special duties or executive details in the same department, is also pointedly made by FOLGER, C. J., in *Slater v. Jewett*, 85 N. Y. 61; s. c., 39 Am. Rep. 627. Neither of these cases has ever been questioned or criticised, although two or three late cases in the same court, which seem not very carefully considered, appear to lay down a somewhat different rule, but without much discussion or reference to the authorities.

This court has itself recognized the same distinction. In *Brown v. Minn. & St. L. R. Co.*, 31 Minn. 553, we held that a station agent who had general charge of the tracks in and about his station, and whose duty it was to keep them clear and in safe condition for passing trains, was a fellow-servant with an engineer on such a train. In *Roberts v. Chic., etc., Ry. Co.*, 33 Minn. 218, decided at the present term, we held that a switch-tender and a baggage-master were fellow-servants. *Drymala v. Thompson*, 26 Minn. 40, is not in conflict with this distinction. That case was decided upon

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the ground that the "section foreman," to whom was intrusted the duty of repairing or "furnishing" the track, was the representative of the master, and this was at the time, and is yet, generally considered what might be termed a "border case."

The management of an extensive business like that of operating a railroad includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed "vice-principals," or representatives of the master, and those who are to be deemed "fellow-servants," as to other employees; but the fact of such a distinction is everywhere recognized. To hold that the master is responsible to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching or guarding the instrumentalities used by other employees would virtually abrogate the whole doctrine of common employment." There is hardly an employee in the service of any railroad whose duties do not, in part at least, relate to the matter of maintaining in safe condition the track or rolling stock. If the rule be that all these *pro hac vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule if applied to farmers, manufacturers, and others would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in this case would seem to lead; for I can see no distinction in principle between these "car inspectors" and switch-tenders, station agents, guards, watchmen and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees.

NOTE BY THE REPORTER. — It will prove convenient to group here the numerous cases reported in this series on the question as to who are fellow-servants and who are not.

Who are fellow-servants.—A yard laborer and a locomotive engineer; *Chicago & Alton R. Co. v. Murphy*, 50 Ill. 836; s. c., 5 Am Rep. 48. A railway road-master and a laborer on a culvert; *Lawlor v. Androscoggin R. Co.*, 62 Me. 463; s. c., 16 Am. Rep. 492. A mill-hand and other employees bound to keep fire apparatus in order; *Jones v. Granite Mills*, 128 Mass. 84; s. c., 80 Am. Rep. 661. The master of a lighter and the crew; *Johnson v. Boston Tow Boat Co.*, 185 Mass. 209. Mechanics in a repair shop; *Murphy v. Boston & Albany R. Co.*, 88 N. Y. 146; s. c., 42 Am. Rep. 240. Road master and section-hand; *Brown v. Winona & St. Peter R. Co.*, 27 Minn. 162; s. c., 88 Am.

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Rep. 285. A foreman having no power to discharge employees, and an employee; *Peterson v. Whitebreast Coal and Mining Co.*, 50 Iowa, 673; s. c., 32 Am. Rep. 143; *Keystone Bridge Co. v. Newberry*, 96 Penn. St. 246; s. c., 42 Am. Rep. 543. Engineer and brakeman; *Nashville, etc., v. Wholesale*, 10 Lea, 741; s. c., 43 Am. Rep. 317. Brakeman and car-inspector; *Smith v. Flint, etc., Ry. Co.*, 46 Mich. 258; s. c., 41 Am. Rep. 161. Conductor and telegraph operator and fireman; *Slater v. Jewett*, 85 N. Y. 61; s. c., 39 Am. Rep. 67. Train-dispatcher and brakeman; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77; s. c., 41 Am. Rep. 552. Master and mate of a vessel; *Matthews v. Case*, 61 Wis. 491; s. c., 50 Am. Rep. 51. A baggage-master on a train and a switch-tender; *Roberts v. Chicago, etc., Ry. Co.*, 33 Minn. 218. See also, *Cassidy v. Me. Cent. R. Co.*, 76 Me. 488; *Rodman v. Michigan Cent. R. Co.*, 55 Mich., ; *O'Brien v. Boston & Albany R. Co.*, ante.

Who are not fellow servants.—The agent of a railroad company to hire men, and a foreman hired by him; *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 417. A deck-hand on steamboat A., and the crew of steamboat B., the owners being partners; *Connolly v. Davidson*, 15 Minn. 519; s. c., 2 Am. Rep. 154. A laborer in a railroad carpenter shop and a locomotive engineer; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171; s. c., 14 Am. Rep. 32. A railway train-despatcher and a fireman; *Flike v. Boston & Albany R. Co.*, 58 N. Y. 549; s. c., 13 Am. Rep. 545. A carpenter having charge of repairs and a laborer in a brewery; *Malone v. Hathaway*, 64 N. Y. 5; s. c., 21 Am. Rep. 578. A superintendent with power to hire and discharge and an employee; *Brothers v. Cartter*, 52 Mo. 373; s. c., 14 Am. Rep. 424; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Mullan v. Phila. Steamship Co.*, 78 Penn. St. 25; s. c., 21 Am. Rep. 2; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; s. c., 14 Am. Rep. 598; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 362; s. c., 44 Am. Rep. 573; *Mitchell v. Robinson*, 80 Ind. 281; s. c., 41 Am. Rep. 812; *Tyson v. N. & S. Ala. R. Co.*, 61 Ala. 554; s. c., 32 Am. Rep. 8; *Dowling v. Allen*, 84 Mo. 13; s. c., 41 Am. Rep. 298; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; s. c., 47 Am. Rep. 653; *Ryan v. Bagaley*, 50 Mich. 179; s. c., 45 Am. Rep. 85. The conductor, engineer of a railway train and a brakeman; *Cowles v. Richmond & Danville R. Co.*, 84 N. C. 309; s. c., 37 Am. Rep. 620. A superintendent of repairs and an engineer; *Fuller v. Jewett*, 80 N. Y. 46; s. c., 36 Am. Rep. 575. Roadmaster and bridge-builder, and fireman; *Davis v. Cent. Vt. R. Co.*, 55 Vt. 84; s. c., 45 Am. Rep. 590. A train dispatcher and an engineer; *Booth v. Boston & Albany R. Co.*, 78 N. Y. 88; s. c., 29 Am. Rep. 97. A track-repairer and a fireman; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; s. c., 34 Am. Rep. 168. One who was engineer, superintendent and conductor of a gravel train, and a train hand; *Dobbin v. Richmond & Danville R. Co.*, 81 N. C. 446; s. c., 31 Am. Rep. 512. Master mechanic, engineer and fireman, and trackman; *Ohio and Miss. Ry. Co. v. Collam*, 72 Ind. 261; s. c., 33 Am. Rep. 184. Foreman and car-repairer; *Luebki v. Chicago, M. & St. P. Ry. Co.*, 59 Wis. 127; s. c., 48 Am. Rep. 483. A section foreman and a brakeman; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385. A superintendent and foreman and a conductor; *Patterson v. Pittsburgh, etc., R. Co.*, 76 Penn. St. 339; s. c., 18 Am. Rep. 412. A conductor and a section fore

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man and a brakeman; *Meon's Adm'r v. Richmond, etc., R. Co.*, 78 Va. 745; s. c., 49 Am. Rep. 401. Conductor of a construction train and a laborer; *Chicago, St. P. M. and Omaha Ry. Co. v. Swanson*, 16 Neb. 254; s. c., 49 Am. Rep. 718.

See note, 16 Am. Rep. 495; 31 Am. Rep. 7, 579; 49 Am. Rep. 406. Also, *Kelly v. Abbott*, *post*.

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(33 Minn. 238.)

Negligence — action — municipal ordinance — when inures to third person.

Where a city ordinance in pursuance of the charter makes it unlawful to leave a team standing unfastened or unguarded in a street, any one injured by a violation thereof may maintain an action against the wrong-doer. (See note, p. 52.)

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

O'Brien & Wilson, for appellants.

Wm. Ely Bramhall and *Gordon E. Cole*, for respondent.

VANDEBURGH, J. The charter of the city of St. Paul empowers the city council by ordinance to compel persons to fasten their horses or other animals attached to vehicles while standing in the streets; such ordinance to have the force of law within the municipal jurisdiction, and to be enforced by the proper penalties. In pursuance of this provision the following ordinance was passed, and was in force when the accident out of which this action arose occurred: "It shall not hereafter be lawful for any teamster or driver or owner, or any person or persons having in charge any team attached to any vehicle within the city of St. Paul to leave the same standing in or along any public street in said city without being securely hitched or fastened, or without being held by some one securely." The defendants left a team of horses attached to a wagon loaded with wood in a public street, standing unhitched and for the time without being held or in the charge of any one, the driver, defendants' servant, having temporarily left them to make inquiry in reference to the place of delivery of the wood. In his

absence the team started and ran down Wabash street, one of the most public thoroughfares of the city across the bridge over the Mississippi river, and colliding with the plaintiff's wagon, caused the injury complained of. There was no evidence showing the particular circumstances which caused the horses to take fright and run away. But the plaintiff's case rests upon the facts above stated, which are undisputed.

The questions of fact as to the character and extent of plaintiff's injuries, and whether he was guilty of contributory negligence in the premises, and also whether the fact that the team was left unfastened and unguarded in a public street was the proximate cause of the injury, were settled by the verdict. *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

The only question then remaining for our consideration is the question of the liability of the defendants in a civil action for the natural and probable consequences of the unexcused omission of their servant to fasten the team. We say unexcused, because in view of the language and purpose of the charter and ordinance it is manifestly no sufficient excuse that the horses were believed to be gentle and not vicious, and had never been known to run away. If the action were simply an ordinary action for negligence, in the absence of any statutory duty, these circumstances, with others, might have been considered by the jury in determining the question of negligence—*Griggs v. Fleckenstein*, 14 Minn. 62 (81)—though in such an action the fact that the horses ran away and were not properly hitched, would be evidence of negligence in not fastening them. *Strup v. Edens*, 22 Wis. 432; *Courternier v. Secombe*, 8 Minn. 264 (299). But in refusing defendants' instructions to the jury the court rested the action upon the breach of the ordinance, and in substance charged them that the fact of so leaving the horses so unattended and of the runaway and injury to plaintiff in consequence, if the jury should so find, established a case against the defendants. The case turns upon the correctness of these instructions.

Highways are dedicated to the use of travellers, and hence it is held to be the law that where horses are unlawfully turned loose or permitted to be at large in a public street by the owner, he is liable for any resulting injury or trespass without reference to the question of previous knowledge of their vicious disposition or character. *Barnes v. Chapin*, 4 Allen, 444; *Goodman v. Gay*, 15 Penn.

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St. 188, 193; s. c., 53 Am. Dec. 589. In *Barnes v. Chapin* the court say (p. 446): "It has long been regarded as inconsistent with the safety and convenience of travellers to permit horses to go at large on the highway and such an act is an offense against our statutes." The difference between that case and this is that while the defendants' horses were rightfully on the public street, they were unlawfully left unguarded. The breach of duty arising from the violation of the statute in one case, and the ordinance in the other, is of the same nature, and the consequences the same, as relating to the safety of persons using the streets. Travellers on a highway would have a right to assume that the statutes referred to were made for their protection, and that they were therefore entitled to the benefit thereof in enforcing a claim for damages against persons through whose neglect to observe the requirements of such statutes they have suffered injury. And so it is insisted by the plaintiff in this action that this ordinance is binding as law upon the inhabitants of the city; that it was lawfully made for a similar purpose, and involves like duties and responsibilities as respects persons within the municipal jurisdiction. This point will be further considered in the course of the opinion.

Wherever a statute creates a duty or an obligation, then though it has not in express terms given a remedy, the remedy which is by law properly applicable to that obligation follows as an incident. Add. Torts, § 58; *Parker v. Barnard*, 135 Mass. 116; s. c., 46 Am. Rep. 450; *Patterson v. Detroit, etc., R. Co.*, 22 N. W. Rep. 260. But whether a liability arising from the breach of a statutory duty accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character must depend upon the nature of the duty enjoined and the benefits to be derived from its performance. *Taylor v. Lake Shore & M. S. R. Co.*, 45 Mich. 74; s. c., 40 Am. Rep. 457; *Hayes v. Mich. Central R. Co.*, 111 U. S. 228, 240; Cooley Torts, 658.

To illustrate: *Patterson v. Detroit, etc., R. Co.*, *supra*, was an action for damages by a traveller against defendants for obstructing a highway in violation of the provisions of a statute prohibiting railway companies from obstructing a street-crossing longer than five minutes. *Parker v. Barnard* was an action for damages by a person injured through defendant's omission, in disregard of a statute, to protect a hatchway by a railing. *Hayes v. Mich. Central R. Co.* is a case where as in this case an action for damages was

predicated upon the negligent omission to comply with an ordinance which a city had passed under legislative authority, and which was intended as a protection to persons from injuries. In *Salisbury v. Herchenroder*, 106 Mass. 458; s. c., 8 Am. Rep. 359, plaintiff recovered damages occasioned by the falling of a sign (in an extraordinary gale) which had been suspended over a street contrary to a city ordinance, and defendant was not otherwise negligent. In *Owings v. Jones*, 9 Md. 108, 117, the defendant was held liable for consequent damages to a party injured through a negligent omission to comply with the provisions of a city ordinance which provided the mode in which the vaults in public streets should be protected. In *Devlin v. Gallagher*, 6 Daly, 494, a failure to comply with the provisions of an ordinance requiring certain precautions in blasting was held *prima facie* evidence of negligence, sufficient to support an action by one injured through such default. In *Baltimore City Ry. Co. v. McDonnell*, 43 Md. 534, under a city ordinance limiting the speed of cars to six miles an hour, the defendant was held liable if the jury believed from the evidence that the accident would have been avoided if the cars had not been moving at a greater speed. *Johnson v. St. Paul & Duluth R. Co.*, 31 Minn. 283; *Correll v. B. C. R. & M. R. Co.*, 38 Iowa, 120; *Siemers v. Eisin*, 54 Cal. 418.

The city ordinance under consideration was undoubtedly intended for the benefit of persons travelling on the streets, and all such persons while so travelling would have the right to expect the ordinance to be observed and to govern themselves accordingly. *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Lane v. Atlantic Works*, 111 Mass. 136.

On the other hand where the duties enjoined are due to the municipality or to the public at large, and not as composed of individuals, a different rule is intended to apply. This is well illustrated by the cases of *Kirby v. Boylston Market Assn.*, 14 Gray, 249, and *Flynn v. Canton Co.*, 40 Md. 312, 323; s. c., 17 Am. Rep. 603, in which it was held that the owners of land abutting on streets were liable to the city alone for the breach of ordinances requiring such owners to keep sidewalks clear of snow and ice, and in good repair, and that they were not liable in damages to persons injured by their neglect to perform the duties enjoined by such ordinances. This proceeds upon the ground that it is the sole duty of the city to keep the streets in good repair and clear of snow and ice. The work done

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and fines or taxes collected in such cases to the extent thereof are to be considered as so far in aid of the city in the discharge of its duty. See also *Taylor v. Lake Shore & M. S. R. Co.*, *supra*; *Heeney v. Sprague*, 11 R. I. 456, s. c., 23 Am. Rep. 502. And so also generally of ordinances or statutes relating specially to duties due strictly to the corporation or State.

The analogy between statutes and the ordinances of cities is of course not to be extended beyond the proper limits of municipal jurisdiction. But in matters properly of local cognizance it is necessary and eminently proper that such powers should be committed to the municipality to be exercised through ordinances which shall be subordinate to and consistent with the general laws or in proper cases be authorized to take their place. Cooley Const. Lim. 199. An ordinance which a municipal corporation is authorized to make is as binding on all persons within the corporate limits as any statute or other laws of the Commonwealth, and all persons interested are bound to take notice of their existence. *Heland v. City of Lowell*, 3 Allen, 407; *Vandine's Case*, 6 Pick. 187; s. c., 17 Am. Dec. 357; *Gilmore v. Holt*, 4 Pick. 257; *Johnson v. Simonton*, 43 Cal. 242, 249.

As respects the ordinance in question it was, as we have seen, authorized by the charter, was within the proper sphere of municipal legislation and not inconsistent with or in contravention of general laws, and though local in its application, it was obligatory upon persons within the limits of the city; and there is no reason why it should not be held to impose a legal duty, such that a civil action for damages might be maintained for a breach thereof, as in the case of like statutory duties. *Hayes v. Mich. Central R. Co.*, *supra*; *Mason v. City of Shawneetown*, 77 Ill. 533; *Flynn v. Canton Co.*, 40 Md. 312; s. c., 17 Am. Rep. 603; *Jackson v. Shawl*, 23 Cal. 267. Some courts however deny the application of the rule in case of city ordinances and insist that it is applicable solely to laws enacted by the legislature. *Heeney v. Sprague*, 11 R. I. 456; s. c., 23 Am. Rep. 502; *Vandyke v. Cincinnati*, 1 Disney (Ohio), 532; *Philadelphia, etc., R. Co. v. Ervin*, 89 Penn. St. 71; s. c., 33 Am. Rep. 726. These were cases arising out of a failure to comply with ordinances similar in character to the one considered in *Flynn v. Canton Co.*, and might have been disposed of on the same ground, and were rightly determined without necessarily involving the question we are considering.

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A different view is also suggested in *Chambers v. Ohio Trust Co.*, 1 Disney (Ohio), 327, 336; and in *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488, it was held by a divided court that the result of the decisions in New York is that a breach of a municipal ordinance is evidence of negligence merely, to be considered with other facts in the case. But we do not regard the case of much value as an authority. The rule is to be regarded as a common-law rule, and it would hardly be consistent or reasonable to hold that it might be applicable to an act of the legislature, and inapplicable where the legislature, instead of itself enacting a law, should in a proper case expressly authorize a municipal corporation to make the same law for the local jurisdiction. Suppose for instance that the legislature had itself expressly enacted the substance of the ordinance in question in the charter, instead of authorizing the city council to enact it; could it be said that in the former case an injured party would be entitled to indemnity and in the latter not? In this class of cases therefore proof of a breach of the ordinance will make a case of negligence; but of course the plaintiff must make it appear, as the court properly charged the jury in this case, that the injury complained of resulted in the alleged neglect of the duty thereby imposed; and so defendant may show, as matter of defense, that the accident occurred without his fault, or that the observance of the ordinance was immaterial as respects the plaintiff, as for instance in the case of the omission to ring the bell of an engine, of the approach of which the plaintiff otherwise had notice.

Order affirmed.

NOTE BY THE REPORTER.— This question was reviewed in *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524, where ALLEN, J., said: “The remaining question to be considered arises upon several exceptions to the instructions of the learned judge in respect to the negligence of the defendant, and his comments upon the evidence touching that part of the case. The negligence upon which reliance was placed by the plaintiff, and upon which we may assume that the verdict passed against the defendant, was the rate of speed at which the train was moving at and before the time of the collision. Irrespective of any ordinance or law regulating the speed of railroad trains, it was a question of fact whether the rate was excessive or dangerous in that locality, and if so found by the jury, and such excessive rate of speed caused the collision, the defendant was liable for the consequences. *Wilds v. H. R. R. Co.*, 29 N. Y. 815. By an ordinance of the city of Cohoes, the validity and binding authority of which is not questioned, the defendant was prohibited from running its trains within the city limits ‘at a greater rate of speed than eight

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miles an hour.' The evidence is very satisfactory that this particular train was running at a much greater rate of speed than that permitted by the ordinance. Whether a violation of this ordinance is necessarily an act of negligence, or such a wrongful act in violation of law as legally to charge the defendant with any injuries resulting from such act, may be regarded as an open question in this State. The decision in *Brown v. Buffalo and State Line Railroad Company*, 22 N. Y. 191, that a city ordinance regulating the speed of road trains was not admissible in evidence for any purpose, in an action against a railroad corporation for negligently causing the death of an individual, was dissented from by Judges SELDEN, DENIO and CLERKE, and has been overruled. *Jetter v. N. Y. and H. R. R. Co.*, 2 Abb. Ct. App. 458; s. c., 2 Keyes, 154; *Beiseigel v. N. Y. C. R. Co.*, 14 Abb. (N. S.) 29. The actual decisions in this State have however only gone to the extent of holding that city ordinances of this character are competent evidence upon the question of negligence of railroad corporations, and with proof of a greater rate of speed than that prescribed proper, with all the other evidence in the case to be submitted to the jury for their consideration. It has not been necessary in any case in which the question has arisen for the courts to go further. In *N. Y. etc., R. Co.*, *supra*, there is a plain intimation that a municipal ordinance, passed by authority of the legislature, has the force of an express statute, and that every violator of it is a wrong-doer, and *ex necessitate* negligent in the eye of the law, and that every innocent party injured by such violation is entitled to his civil remedy for such injury. This would make railroad corporations liable to the same extent for a disregard of a city ordinance regulating the rate of speed of trains, as for an omission of the statutory signals of sounding the whistles or ringing the bell at highway crossings. It is said in the same case that every man has a right to assume that others will obey the law and not bring injury upon him by its violation. See also *Newson v. N. Y. Cent. R. Co.*, 29 N. Y. 888. Judge GROVER in *Beiseigel's* case, *supra*, in an opinion concurred in by all the members of this court, took the same view of the legal effect of a city ordinance upon the civil rights of the parties. In *Lane v. Atlantic Works*, 111 Mass. 186, the jury were charged that a city ordinance forbidding the leaving of trucks in the street was proper to be considered by them upon the question of negligence, although not conclusive proof that the defendants were in point of fact negligent; that it was a matter of evidence to be weighed with all the other evidence in the case. Upon an exception by the defendant to this ruling the court in banc merely say: 'This was sufficiently favorable to the defendants.' In *McGrath v. N. Y. Cent. etc.*, 63 N. Y. 523, the same view is taken of the effect of an ordinance as did the judge upon the trial in the case last cited; but the judgment in the case did not necessarily decide that point; and as before suggested, it must be regarded as an open question with us.

"The dicta in the several cases in this court may be referred to the manner in which in each case the precise question involved was made, rather than as intended as a committal on the main question. In Maryland it is held that if a railroad company does not conform to city ordinances, providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its busi-

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ness, and is responsible for any injury which it may occasion if the party injured be not in fault. *Baltimore and Ohio Railroad v. State*, 20 Md. 252.

"Within all the cases if the judge merely submitted the ordinance in connection with the other evidence to the jury for their consideration, leaving it to them to give such effect to it as bearing upon the question of negligence as they should under all circumstances deem it entitled to, there was clearly no error, and the exceptions to the charge and the comments of the judge upon the subject are untenable."

This doctrine was followed in 84 N. Y. 488, where the court said: "In *Brown v. B. & State Line R. Co.*, 22 N. Y. 191, the court charged the jury that if the injury occurred while defendant's train was running in violation of a city ordinance and at a rate of speed forbidden by it, and was occasioned by or would not have occurred except for such violation, the defendant was liable, and this direction was held to be in error. This doctrine is however repudiated in *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. 458, as well as in subsequent cases. In the last case cited it was held that a party in doing a lawful act where there is no present danger or appearance of danger, has a right to assume that others will conform their conduct to the express requirements of the law and not bring injury upon him by its violation. It is also strongly intimated that a violator of such an ordinance is a wrongdoer and necessarily negligent, and a person injured thereby is entitled to a civil remedy. The distinct point now raised was not however fairly presented by the charge to which exception was taken, which was not otherwise erroneous. In *Beiseigel v. N. Y. C. R. Co.*, 14 Abb. Pr. (N. S.) 29, it was held that it was some evidence of negligence to show that an ordinance was violated, and the charge of the judge upon the trial to that effect was upheld. In *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522, it was laid down that the violation or disregard of an ordinance, while not conclusive evidence of negligence, is some evidence for the consideration of the jury. In *Massoth v. D. & H. Canal Co.*, 64 N. Y. 524, the cases are reviewed, and it was said to be an open question in this court whether the violation of a municipal ordinance was negligence *per se*, and it was held that the city ordinance being submitted to the jury with the other evidence as bearing upon the question, but not as conclusive, there was no error in the parts of the charge excepted to. The result of the decisions therefore is that the violation of the ordinance is some evidence of negligence, but not necessary negligence."

In *Siemers v. Eisen*, 54 Cal. 418, where the facts were precisely like those of the principal case, the court said: "The failure of any person to perform a duty imposed upon him by a statute or other legal authority should always be considered evidence of negligence, or something worse. Whether it constitutes such negligence as tended to cause the injury to the plaintiff in any particular case is another question, the principles governing which are stated elsewhere; but such an omission must constitute just cause for complaint on the part of the State, if not of individuals; and when no evil intent appears, the omission may properly be regarded as simple negligence. The omission to perform a legal duty being proved, the plaintiff ought not to be required to prove further that the act omitted was inherently essential to the

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exercise of due care by the defendant. Thus, if a railroad company is required by law to fence its track, to ring bells, or to give other warnings of danger; or if one building a wall is required to make it of a certain thickness; or if obstructions to a street are prohibited, a violation of any of these legal regulations is sufficient evidence of negligence." Shearm. & Redf. Neg. § 18, A.

" 'So if a specific duty is imposed upon any person by law or by legal authority an action may be sustained against him by any person who is specially injured by his failure to perform that duty.' § 54 A.

" 'It is an axiomatic truth that every person while violating an express statute is a wrong-doer, and as such is *ex necessitate* negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have." *Jetter v. N. Y., etc., R. Co.*, 2 Abb. Ct. App. 464.

In *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 26 Fed. Rep. 596, BROWN, U. S. Circ. J., said: "In this connection we understand it to be the law that the violation of a statutory obligation, or a proved neglect to conform to the requirements of good seamanship, followed by a disaster, raises the presumption that such neglect contributed to it. This has been reiterated so many times in collision cases as to have become elementary. In *Taylor v. Harwood*, Taney, 437, 444, the chief justice stated in general terms that 'the omission of a known legal duty is such strong evidence of negligence and carelessness that, in every case of collision happening under such circumstances I should hold the offending vessel as altogether at fault, unless clear and indisputable evidence established the contrary.' We understand this principle to be of general application in all actions where the question of negligence is involved. Shear. and R. Neg., § 484. In *Jetter v. New York & H. R. R.*, 2 Keyes, 154, a charge that a street car proceeding at a rate forbidden by the city ordinances would render the company liable, because in such case the accident would be the result of their violating the city ordinances, was held to be proper, notwithstanding the decision to the contrary in *Brown v. Buffalo & S. L. R.*, 22 N. Y. 191, relied upon by the plaintiff here. See also *Masoth v. Delaware & H. C. Co.*, 64 N. Y. 524; *Langhoff v. Milwaukee R. Co.*, 19 Wis. 489; *Hayes v. Mich. Cent. R. Co.*, 111 U. S. 228. All the authorities are reviewed in an elaborate opinion in *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387; s. c., 28 Am. Rep. 729, and the case of *Brown v. Railroad Co.*, 22 N. Y. 191, distinctly repudiated."

See *Noonan v. City of Stillwater*, ante, 28; *Taylor v. Lake Shore, etc., Ry. Co.* (45 Mich. 74); s. c., 40 Am. Rep. 457.

Nichols v. City of Minneapolis.

NICHOLS v. CITY OF MINNEAPOLIS.

(33 Minn. 420.)

Telegraph company — negligence — fall of wires.

A telephone company is liable for an injury to a traveller caused by the fall of wires on a street, although the fall was occasioned by ice produced by water thrown upon them by the fire department.*

ACTION for personal injuries against the city and a telephone company. The opinion states the case. The plaintiff had judgment below.

Campbell & Buildes, for appellant, telephone company.

Worrall & Jordan, for respondent.

MITCHELL, J. The important facts in this case are these: The defendant company under a license from the defendant city erected and maintained on and along a public street, its poles and wires for a telephone exchange system. On the night of January 31st a fire occurred in a building fronting on this street. While the city fire department were throwing water upon the burning building, water fell and froze upon the cross-bars to which the wires were attached to such an extent as to break them from the poles and to let the wires, to the number of some forty, down upon the sidewalk and street. Portions of some of these wires became imbedded in the ice, while the remainder lay exposed and loose on top of the ice. Immediately or soon after the fire the company cut off the fallen wires at either end of this break and spliced their lines over and past it.

There is some conflict in the evidence as to what the company did in the way of removing the fallen wires thus cut off from their lines; but there is evidence reasonably tending to prove that they merely reeled up and carried away some of the loose wires, but left the remainder in the street and on the sidewalk, and that of the wires thus left some were lying loose and others partly imbedded in the ice and partly loose or curled up on top of the ice. Some

*See *Ward v. Atlantic & Pacific Tel. Co.* (71 N. Y. 81), 27 Am. Rep. 10; *Allen v. Atlantic & Pac. Tel. Co.*, 21 Hun, 22.

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one (who does not appear) after the fire stretched a rope across the sidewalk in front of the burned building, so as to prevent travel on it; but as before stated these wires extended some distance into the street beyond the sidewalk. The plaintiff occupied a livery stable adjacent to the burned building and was aware of the general condition of the street after the fire and that these wires were lying there, although not aware of the existence of the particular one that caused the injury. On the evening of February 8th, and after dusk, the plaintiff started from his place of business to go to his home, the direct route to which led him past the burned building. On coming to the rope across the sidewalk he passed around it into the street, and while walking along, caught his foot in one of these wires — the ends of which were fastened into the ice, thus forming a loop — tripped and fell and sustained the injury complained of. The telephone company was made a co-defendant with the city, under the provisions of section 18, chap. 8 of the city charter (Sp. Laws 1881, chap. 76). A recovery having been had against them, both defendants appeal.

[Minor points omitted.]

3. The remaining and most important question in the case is as to the liability of the telephone company. We quite agree with counsel that no new liability on part of the company to the plaintiff is created by section 18, chap. 8 of the city charter referred to. The only effect of this section is, where a common-law liability exists, to require the plaintiff to join the party thus liable as co-defendant with the city, although the two are not joint tort-feasors. This is for the benefit of the city.

The liability of the company rests upon another ground. It had a license from the city to swing these wires over the public street. But this license was not without its burdens. It carried with it an implied obligation to erect and maintain these wires in a safe condition, so that they should not become nuisances or endanger the safety of the travelling public. If any injury should arise to a traveller by reason of the improper and unsafe mode of erecting the poles or stringing the wires, the company would be liable precisely as would any person who commits a nuisance in a public highway. The same rule would apply when after erections are properly made the company negligently suffers them to fall down or to be out of repair or to remain so after reasonable notice. It was as much its duty safely to maintain as it was safely to erect. Whether the unsafe

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condition was or was not in its inception the result of a cause for which the company was responsible is only material in determining when the negligence began and in what it consisted. If it was the result of negligent construction this would constitute the negligence. On the other hand if, as in this case, the unsafe condition was the result of a cause for which the company was not at all responsible the negligence consists, not in the fact that the wires fell into the street, but in the fact that they were allowed to remain there after reasonable notice to the company and the lapse of sufficient time within which to remove them. The duty of the company in such a case, it seems to us, is not at all dependent upon the nature of the cause which produced the unsafe condition. So far as the duty of removing the wires from the street was concerned, it was immaterial whether their fall was the result of natural decay, of a malicious and unlawful act of some third person, of some extraordinary force of nature, or as in this case, of the freezing of water thrown upon the cross-bars by the fire department. Nor could the company which had placed its property on a public street under a license from the city, relieve itself of this duty by assuming to abandon it, when from natural wear or sudden casualty it had ceased to be valuable for the purpose for which it had been placed there.

The implied obligation arising from the fact that the structure was placed upon the street under this license is what, in our judgment, clearly distinguishes this case from the case suggested by counsel, where a person's property without his authority or procurement is carried into the street and deposited there. Whatever might be the duty of the owner in the case supposed, the two cases are not analogous. We do not suggest that it was the duty of the telephone company in this case to remove the body of ice and *debris* on the street for the purpose of removing such portions of its wire as were imbedded therein, but we think it was its duty, within a reasonable time, to remove such portions as were exposed in such a way as to endanger the safety of those lawfully using the street, and that in failing to do so for eight days it was guilty of negligence. At least the jury were justified in so finding.

Order affirmed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

EX-PARTE MOONEY.

(33 W. Va. 23.)

Habeas corpus — when does not lie to review final judgment.

Where a statute authorizes imprisonment in the penitentiary or imprisonment in jail and a fine, and a court adjudges imprisonment in the penitentiary and a fine, the defendant is not entitled to discharge on *habeas corpus* until he has served the term of imprisonment.*

HABEAS corpus. The opinion states the case.

J. O. Pendleton and W. W. Arnett, for plaintiff in error.

Alfred Caldwell, attorney-general for sheriff.

SNYDER, J. Upon the petition of John Mooney, alleging that he was detained, confined and restrained of his liberty by W. C. Handlan, sheriff of Ohio county in the jail of said county, without authority of law, a judge of the Circuit Court of said county on June 5, 1885, in vacation awarded a writ of *habeas corpus*, commanding said sheriff to produce before him the body of said Mooney together with the cause of his being detained. The respondent on

* See *People v. Liscomb* (60 N. Y. 559), 19 Am. Rep. 211.

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the same day produced before the judge the said Mooney and in his return stated that he detained him by virtue of a judgment of the said Circuit Court, dated May 16, 1885, a copy of which is made part of his return. From this copy it appears that the petitioner Mooney was tried by said court upon an indictment and by the verdict of a jury "found guilty of unlawfully wounding Frank McAdams, with intent to maim, disfigure, disable and kill him," and that upon said verdict the court pronounced judgment, "that the prisoner, John Mooney, be conveyed to the penitentiary of the State and confined therein for the period of one year and treated therein as prescribed by law, and that he pay a fine of \$100," and costs, etc.

The petitioner demurred to and moved to quash the return as insufficient. The judge overruled said demurrer and motion and remanded the petitioner, and he thereupon obtained this writ of error.

The statute under which said indictment was found and judgment pronounced is as follows:

"If any person maliciously shoot, stab, cut or wound any person or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall, except when it is otherwise provided, be punished by confinement in the penitentiary not less than two nor more than ten years. If such act be done unlawfully, but not maliciously, with the intent aforesaid, the offender shall at the discretion of the court, either be confined in the penitentiary not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding \$500. Sec. 9, chap. 118, Acts 1882.

It is contended for the petitioner that this statute did not authorize the court to sentence the petitioner to confinement in the penitentiary and also to pay a fine, but that the only construction of it is that the court may sentence him to the penitentiary simply, or it may sentence him to confinement in jail and to pay a fine, and that by no reasonable interpretation of it can the court unite a fine with confinement in the penitentiary. And it is therefore claimed that inasmuch as the court has sentenced the petitioner to the penitentiary and also to pay a fine it has exceeded its jurisdiction, and as a consequence the whole sentence or judgment is void and the petitioner is entitled to be discharged on *habeas corpus*.

Whether or not this is the true interpretation of the statute, it is unnecessary and perhaps improper to decide in this proceeding, as

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it is not the only construction that can by any possibility be given to it, the proper mode of having it construed is by writ of error to said judgment and not by this collateral proceeding. But conceding for the purposes of this writ of error that such is the true and only proper construction of the statute, and that the court committed a manifest blunder in pronouncing the sentence it did, then the vital question is presented: Is the petitioner illegally detained by the sentence?

Before discussing this question I deem it proper to consider a matter of practice and to state some of the general principles governing the courts in cases of *habeas corpus*.

The petitioner in this case demurred to the return and moved to quash it as insufficient. In some cases this has been allowed, but the better, and what now seems to be the settled practice, is for the petitioner, if he deems the return insufficient to move to discharge the prisoner. On this motion the return is conceded to be true, and unless it shows sufficient cause for the detention of the prisoner he will be discharged. *Cunningham v. Thomas*, 25 Ind. 171; *Watson's case*, 26 Eng. C. L. 237.

The writ of *habeas corpus* is applicable to two distinct classes of cases. First, where the restraint or detention is by private authority, and second, where the detention is by commitment under legal process. The latter class is all that need be considered in this case. In this class the jurisdiction is in a general sense appellate in its nature, because the decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and the writ must always be for the purpose of revising that decision, and therefore is appellate in its nature. *Ex parte Bollman*, 4 Cranch, 75.

Appellate jurisdiction in the sense that it is here used does not necessarily import a subordination of one court or officer to another, although that is its more usual signification. It signifies the power to act judicially upon a question or right, notwithstanding a supposed conclusion against it resulting from an alleged judgment. It is not, strictly speaking, a power of revision, which includes properly the power to affirm or reverse the judgment or order, and so establish or destroy it, but a power to arrest the execution of a void judgment or order. It acts directly on the effect of the judgment, that is on the imprisonment, but only collaterally on the judgment itself. The jurisdiction therefore under the writ of

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habeas corpus over the judgment or order relied on to justify the imprisonment is only collaterally appellate. Hurd on *Habeas Corpus* (330), 324.

It is the general rule that where the return shows a detainer on legal process the existence and validity of the process are the only facts upon which issue can be taken. 3 Hill, appendix, 658, note, 30; *People v. Cassel*, 5 Hill, 164.

If there is enough on the face of the process to protect the officer who executed it from an action of trespass or false imprisonment, the prisoner will not be discharged under *habeas corpus*. *Bennac v. People*, 4 Barb. 31.

The jurisdiction over the process being only collaterally appellate, as we have seen, *habeas corpus* can not have the force and operation of a writ of error or *certiorari*, nor is it designed as a substitute for either. It does not, like them deal with errors or irregularities which render the proceeding voidable only, but with those radical defects which render it absolutely void. A proceeding defective for irregularity and also one void for illegality may be reversed upon error or *certiorari*, but it is the latter defect only which gives authority to discharge on *habeas corpus*. *Ex parte Van Hogan*, 25 Ohio St. 426; *In re Schenck*, 74 N. C. 607, 610; *Ex parte Virginia*, 100 U. S. 339; *Petition of Semler*, 41 Wis. 517.

An irregularity is defined to be a want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unreasonable time or improper manner. Tidd's Pr. 434. It is the technical term for every defect in practical proceedings or the mode of conducting an action or defense as distinguishable from defects in pleadings. 3 Chitty's Gen. Pr. 509.

Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguishable from mere rules of procedure. It denotes a complete defect in the proceedings. Tidd's Pr. 435; *Ex parte Kellogg*, 6 Vt. 509.

It would be irregular to sentence a person to imprisonment in his absence where the absence was occasioned by the order of the court pronouncing the sentence. It would be illegal to sentence him to imprisonment for a crime which was punishable by pecuniary fine only. *Ex parte Gibson*, 31 Cal. 619; *Petition of Crandall*, 34 Wis. 177.

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Wise rules of procedure established for the regulation of other judicial proceedings are not to be discarded in that of *habeas corpus* when they are applicable. One of these rules is that when a record or process is only collaterally brought into question, it can not be invalidated for error or irregularity. Hurd *Habeas Corpus* (2d ed.), 328 and cases cited. Therefore where a party is imprisoned under a judgment or an order of a court having authority to make the order, he can not be discharged on *habeas corpus*, however erroneous such judgment may be, but it is otherwise if the court had no authority to make the order or jurisdiction to pronounce the judgment. *In re Blair*, 4 Wis. 522; *People v. Cassells*, 5 Hill, 164; *State v. Toule*, 41 N. H. 540; *Williamson's case*, 26 Penn. St. 9; *Matter of Eton*, 27 Mich. 1.

It is a rule essential to the efficient administration of justice that where a court is vested with jurisdiction over the subject-matter upon which it assumes to act, and regularly obtains jurisdiction of the person of the defendant, it becomes its right and duty to determine every question which may arise in the cause without interference from any other tribunal except an appellate tribunal, where its judgment may be revised by writ of error or *certiorari*; but this supervisory jurisdiction can not be exercised upon the collateral proceeding by *habeas corpus*. *Merrill v. Lake*, 16 Ohio, 374, 405; Bac. Abr. *Certiorari*, A.; *Thompson v. Hill*, 3 Yerg. 167; *Smith v. McIver*, 9 Wheat. 532.

Errors which render the judgment merely voidable, and do not make it absolutely void, can not be inquired into under a writ of *habeas corpus*. *In re Prime*, 1 Barb. 340; *State v. Shattuck*, 45 N. H. 211; *Riley's case*, 2 Pick. 171; *Ex parte Watkins*, 3 Pet. 201.

If the judgment is in excess of that which the court rendering it had by law the power to pronounce, such judgment is void for the excess only. *Brook's case*, 4 Leigh, 669; *Murray's case*, 5 Leigh, 720, 724; *Hall's case*, 6 Leigh, 615, 618; *People v. Liscomb*, 60 N. Y. 560; s. c., 19 Am Rep. 211; *Feeley's case*, 12 Cush. 598; *Ex parte Shaw*, 7 Ohio St. 81; *People v. Markham*, 7 Cal. 208; *People v. Baker*, 89 N. Y. 467.

Proceeding now in the light of these rules and principles of law to determine the direct question: Is the prisoner illegally detained by the respondent under the sentence of the court set forth in the return in this case?

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It is not questioned that the Circuit Court of Ohio county had jurisdiction of the subject-matter, and that it had also regularly acquired jurisdiction over the petitioner to render judgment against him. It is insisted however that as the court had no legal right under the statute to sentence the petitioner both to confinement in the penitentiary and to pay a fine, it exceeded its jurisdiction, and thereby the whole proceeding became illegal and void. In support of this view the cases of *Ex parte Page*, 49 Mo. 291; *Rex v. Ellis*, 5 Barn. & Cress. 395, and *Rex v. Bonne*, 7 Ad. & Ellis, 58, are relied on by counsel for petitioner. The two latter cases were decided upon writs of error by the court of king's bench, and by reason of the peculiar constitution of that court, the determination of such cases by it have no analogy to the proceeding by *habeas corpus* in our courts. I do not therefore regard those cases as authority in this case. The other case from Missouri was in some respects different from the one before us. In that case the extreme limit which the court could inflict as a punishment for grand larceny was fixed by statute at seven years' confinement in the penitentiary; but the court sentenced the prisoner to such confinement for that crime for ten years. The court on *habeas corpus* held that the trial court by that sentence had exceeded its jurisdiction and therefore under the provisions of the statute of that State the petitioner was discharged. The statute referred to declared that when a prisoner is brought up on *habeas corpus*, if it appear that he is in custody by virtue of process by any court or judicial officer, he can be discharged only in one of the following cases: "First, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person. * * * Sixth, where the process is not authorized by any judgment, order or decree, nor by any provision of law." Wagn. Stat. 690, § 35.

The judge who delivered the opinion of the court after quoting said statute, says: "It seems to me that the court in passing the sentence exceeded its jurisdiction in the matter and that it did not act by authority of any provision of law. This application therefore I think comes within the meaning of the statute." 49 Mo. 292.

It seems clear from the opinion that the court decided that case under the influence of the statute, and consequently it can be no precedent and can have no application in a State like ours, where no such statute exists.

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But if that case could be regarded as decided upon principle it must be disapproved, since it is not only contrary to the general rules hereinbefore stated, but it is in positive conflict with numerous other and seemingly better considered decisions of courts of other States. *In re Petty*, 23 Kans. 277; *Ex parte Parks*, 93 U. S. 18; *People v. Jacobs*, 66 N. Y. 9; *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; *People v. Baker*, 89 N. Y. 460.

In the case before us the sentence is severable, which it was not in the Missouri case; and it is unquestionable that the court had authority to inflict either of the punishments it did upon the petitioner; that is, it could have sentenced him to confinement in the penitentiary for one year or it could have sentenced him to confinement in jail and to pay a fine. It is well settled as shown in the preceding part of this opinion that when the judgment or sentence is in excess of that which the court by law had authority to pronounce, it is void as to the excess only. *A fortiori* would a severable sentence be void only as to the excess. As to that part, which the court had the power to pronounce, the sentence is necessarily valid in a proceeding upon *habeas corpus*, because in such proceeding the court has no power to modify or correct the sentence. As the proceeding is collateral to the judgment, the court in this proceeding can only discharge or remand the petitioner. If the judgment is void it will discharge him, but if it is not void, though it may be erroneous and voidable, this court must remand him and nothing more. We can only render such judgment here as the court below should have given in this case and we can not interfere with the judgment in the collateral case in which judgment was pronounced; that can be done only upon writ of error to that judgment. § 26, chap. 157, Acts 1882, p. 512.

In the Matter of Sweetman, 1 Cow. 144, 149, "When a special session found S. guilty of petit larceny and sentenced him to imprisonment for thirty days, and imposed a fine of \$15, also adjudged that unless the fine should be paid, he should be imprisoned for the term of four months; *held*, that the sentence was good for the thirty days, but void for the four months." And the court refused to discharge S. on *habeas corpus*, but remanded him to prison.

In *Ex parte Van Hagan*, 25 Ohio St. 426, the petitioner had been sentenced to imprisonment for six months, when under the statute in force the sentence could not exceed thirty days, on *habeas corpus* the court held: "The punishment inflicted by the sentence in

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excess of that prescribed by the law in force was erroneous and voidable, but not absolutely void. It follows," says the court, "that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment and not *habeas corpus* which is not the proper mode of redress, where the relator was convicted of a criminal offense and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction." 25 Ohio St. 432.

Numerous other cases, some of which have been hereinbefore cited, might be referred to in support of the doctrine thus announced; but without repeating them it is deemed sufficient to state that after careful research, I have been unable to find any case where there has been a discharge on *habeas corpus* from a sentence severable in itself and good as to part but void as to a separate and distinct part, pronounced by a court having competent jurisdiction to render the valid portion of the sentence, unless at the time the discharge was asked the petitioner had undergone the full punishment imposed by the valid portion of the sentence.

For the reasons stated I am of opinion that the order remanding the petitioner be affirmed.

Affirmed.

STATE V. BALLER.

(23 W. Va. 90)

Criminal law — attempt — to impede justice.

An indictment alleged in substance that the defendant unlawfully furnished A. money for the use of B. to induce B. unlawfully to absent himself as a witness on the trial of an indictment against the defendant. *Held*, bad for not stating a payment or offer of payment by A. to B. for that purpose.*

CONVICTION of an attempt to obstruct justice. The opinion states the case.

Leonard & Caldwell, for plaintiff in error.

Alfred Caldwell, attorney-general, for State.

* See *Stabler v. Com.* (95 Penn. St. 818), 40 Am. Rep. 653, and note, 656.

GREEN, J. The only question involved in this case is: Was the indictment in this case good? The only defect claimed by the counsel for the plaintiff in error is that it charges that the defendant below did unlawfully furnish to Ran for the use of Earl \$3 to unlawfully induce Earl to absent himself from the Circuit Court of said county at the February Term, 1883, as a witness on behalf of the State in the trial of an indictment against the defendant below, whereby she, the defendant below, attempted to obstruct the administration of justice. It is claimed by the counsel for the plaintiff in error that the facts alleged in this indictment are insufficient to show that the defendant below did attempt to obstruct the administration of justice, as the giving by her of money to a third party to be given by him to a witness to prevent his attendance as a witness on the trial of a case does not amount legally to an attempt to obstruct the administration of justice, unless this third party gave or tendered this money to the witness or in some other way attempted to induce this witness to absent himself as a witness in that case, and that the indictment was therefore fatally defective because there was no allegation that any inducement was presented to the witness to absent himself as a witness on the trial of this case. The question to be decided is: Was such an allegation necessary to complete the offense charged in the indictment, an attempt to obstruct and impede the administration of justice?

In the case of *Cunningham v. State*, 49 Miss. 701, the court say: "The doctrine of attempt to commit a substantive crime is one of the most important and at the same time most intricate titles of the criminal law. There is no title indeed, unless understood by the courts, or more obscure in the text-books than that of attempts. There must be an attempt to commit a crime, and an act toward its consummation. So long as the act rests in bare intention, it is not punishable, but immediately when an act is done the law judges not only the act done but of the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal and punishable."

An attempt to obstruct or impede the administration of justice by inducing a witness to absent himself from court is unquestionably a misdemeanor. It was a misdemeanor at common law. Hawk. P. C. book 1, chap. 21, § 15, p. 90; *Commonwealth v. Reynolds*, 14 Gray, 89; *State v. Keys*, 8 Vt. 57; s. c., 30 Am. Dec. 450.

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State v. Carpenter, 20 Vt. 9. And it was declared a misdemeanor by the Code of W. Va., chap. 147, § 30, p. 691. This provision in our Code was amended on March 23, 1882, § 1, chap. 134, and by this amendment the punishment of either obstructing or impeding the administration of justice in any court, or the attempt so to do, was fixed at a fine of not less than \$25 nor more than \$200 and imprisonment in the county jail not exceeding six months.

As before said, it is obvious that an indictable attempt to commit this or any other crime must consist of something more than a mere intention to commit the crime. The very word used in the above statute, which declares an attempt to obstruct the administration of justice a misdemeanor, implies that this misdemeanor can be committed only by some act intended to result in the crime. An indictable attempt is therefore such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime which it was designed to effect. This is the definition given by Wharton in his *Commercial Law* (eighth edition) chap. 8, § 173. The great difficulty is to determine what must be the nature of these preliminary acts and the nature of their connection with the intended crime so as to make them an indictable attempt to commit such crime. These preliminary acts, if connected with the intended crime only as a condition as distinguished from a cause, can never according to the better authorities constitute an indictable attempt to commit such a crime. While it is often not difficult to distinguish a condition from a cause, yet they frequently approximate so closely that it becomes exceedingly difficult to distinguish them. By cause is meant that condition which determines the final result. As illustrating the difference between a cause and a condition, I will put the case of the death of a child proceeding from suffocation produced by forcing moss into the child's throat. This would still be considered the cause, as the swelling arose from the forcing of the moss into the child's throat, though the immediate occasion of the child's death was the swelling up of the passages of the throat causing suffocation. In this case the swelling of the throat which occasioned the suffocation was the condition of the death, while the cause of it was the forcing of the moss into the throat. This illustration is found in Wharton's *Criminal Law* (8th ed.) book 1, § 154, p. 184. In the same section is the following illustration: "Iron is dug from a mine, is melted in a furnace, is shapen in a factory, is sold as a weapon by

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a tradesman, is used to inflict a fatal wound by an assassin. Now the mining, the melting, the shaping, the selling are all conditions of the murder, without which it could not in the line in which it was effected have taken place; but none of these acts is a cause of the murder, unless the particular act was done in concert with the murderer to aid him in effecting his purpose."

Perhaps we can not get a clearer conception of the nature of these preliminary acts and of the character of their connection with the intended crime, which made them an indictable attempt to commit such crime, than by referring to some cases which have either actually arisen or which have been stated as illustrations by eminent judges in deciding cases. I do not say that from these cases any rule can be drawn which would lead us to certain results in many cases which might arise; nor do I say that these cases are all of them reconcilable in principle. Still they will aid us in making correct conclusions in this case; and they will illustrate the inherent difficulty and the great obscurity which arises when we undertake to determine whether certain acts are or are not indictable attempts to commit a crime. An indictment lies for attempting to persuade a witness not to appear and give evidence. *Rex v. Lanley*, 2 Strange, 904; *State v. Keyes*, 8 Vt. 57; s. c., 30 Am. Dec. 450; *State v. Carpenter*, 20 Vt. 9. An indictment lies where a party sends a letter to another offering to bribe a minister of state, or where one sends a letter denouncing another with the expressed intention of provoking him to send a challenge to fight. In either case the sending of such letter was a step toward the misdemeanor intended to be accomplished, the corrupt abuse of a minister of his official position or the sending of a challenge. The sending of such a letter is an indictable attempt to cause the commission of such misdemeanor. *King v. Philips*, 6 East, 464. It is an indictable offense to solicit a servant to steal his master's goods, though they were not stolen nor any act done except the soliciting. Such soliciting is an indictable attempt to cause larceny to be committed. *King v. Higgins*, 2 East, 5. If a man intends to commit murder the walking to the place where he intends to commit it would not be a sufficient act to make it an indictable offense. IRWIN, C. J., in *Rex v. Roberts*, 33 Eng. Law and Eq. 539; Dears. 553. So if a man intended to carnally abuse a child and was to take his horse and ride to the place where the child was, that would be a step toward the commission of this offense, but

would not be indictable. Lord ABINGER in *Rex v. Meralith*, 8 C. & P. 589. In the two last cases supposed the acts done stood in relation to the crimes intended to be committed as conditions, not as causes; and for that reason I presume it was held that they were not indictable attempts. So too and for a like reason the buying of a box of lucifer matches with intent to set fire to a house is not an indictable offense. POLLOCK, C. B., in *Rex v. Taylor*, 1 F. & F. 511. An attempt to produce a miscarriage is indictable, though it turn out that the woman was not actually pregnant. *Rex v. Goodall*, 2 Cox C. C. 40.

In some cases acts preparatory to the commission of a crime are themselves a crime and indictable as such and not as an attempt to commit the crime. Decisions based upon the doing of such acts, as constitute a substantial crime in themselves, should be distinguished from those decisions which hold certain acts to be crimes only on the ground that they are attempts to commit crimes. As examples of cases where the doing of certain preliminary acts which look to the commission of certain crimes are regarded *per se* as indictable, as substantive crimes and not properly as attempts to commit the future crime contemplated, I may refer to the carrying of concealed weapons. Whether or not carried with the specific purpose of being used to assail a particular individual, this is a substantive crime and should be indicted as in itself a crime and not as an attempt to commit a crime, even though they were carried with the specific intent of assailing a certain person. So the procuring of dies wherewith to counterfeit is an indictable offense *per se*, and should be indicted as an independent misdemeanor and not as an attempt to counterfeit. It is on this ground that the conclusion reached in *Rex v. Roberts*, 33 Eng. Law & Eq. 553 (Dears. 539) can be sustained.

It is sometimes difficult to determine whether the facts in a particular case constitute *per se* a substantive crime or only an attempt to commit a crime. I shall not undertake to lay down any rules by which the one may be distinguished from the other. And some of the cases which have been or may be put as examples in this opinion may constitute substantive crimes, and ought not perhaps for that reason to be regarded as illustrations of attempts to commit crimes. I regard it in this case as sufficient to call attention to the existence of a difference between such substantive offenses and attempts to commit crime. This difference will aid in some in-

stances in reconciling cases with each other which may at first sight appear to be in conflict.

I will state a few additional cases which have arisen and which throw some light on the questions arising in this case. Thus it has been held that it is not an indictable offense to have possession of forged bank bills of the bank of A., no such bank in fact existing, with the intent to pass them as genuine bills. For this amounts to nothing but an intent to cheat, which at common law is not indictable. *Commonwealth v. Morse*, 2 Mass. 138. If an indictment charged that A. "with force and arms unlawfully and wickedly did attempt to pick the pocket of one B. with intent then and there feloniously to steal, take and carry away the goods and chattels, moneys and property of the said B.," it is fatally defective. *Randolph v. Commonwealth*, 6 Serg. & R. 398. This indictment was held fatally defective because there can be no attempt to commit a crime without the doing of some act; and it is absolutely necessary for the indictment to state the act done, which is claimed to constitute the attempt, in order to give the accused an opportunity of disproving that he did the specific act alleged, and also to enable the court to determine whether what it is claimed he did was an indictable offense. This decision seems to me to be obviously correct; yet it was held in the *People v. Bush*, 4 Hill (N. Y.), 134, that in an indictment for attempting to commit an offense the particular manner in which the attempt was made need not be stated. This, it seems to me, was not the only error committed by the court in that case. The evidence in the case was that the defendant requested one Kinney to set fire to Sheldon's barn, offering him a reward; that afterward, understanding and believing Kinney would set fire to the barn, the defendant gave him a match for the purpose, not meaning to be present himself at the doing of the act. It clearly appeared that Kinney never intended to commit the crime. The court held that the attempt to commit arson was sufficiently proven and the defendant properly convicted. This decision was based on the case of *King v. Higgins*, 2 East, 5, before cited, where it was decided that the soliciting of one to steal was itself a sufficient act to complete the offense of attempting to steal.

There is no question but that solicitations to do certain acts or commit certain crimes are indictable, as for instance, if the object is to provoke the breach of public peace, as in challenges to fight a duel or seditious addresses or the counseling of the resistance of a ju-

dicial writ, or when the object of the solicitation is to defeat public justice, as where perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought. But in these cases these solicitations constitute at common law substantive offenses which are *per se* punishable as misdemeanors, and it is not as attempts to commit crimes that they are punishable. Except in those few cases in which the common law made solicitation to do certain acts a substantive crime, it seems to me that solicitation to commit a crime is generally not a substantive crime, and never can be properly an attempt to commit a crime. As I understand them, the great mass of judicial decisions proceed on the assumption that an attempt to commit a crime is such an intentional preliminary act as will apparently result in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this can not be said of mere advice given to another which he is at full liberty to accept or reject.

That this is a correct view may be deduced from *Smith v. Com.*, 54 Penn. St. 209, where it was held that a solicitation to commit adultery was not indictable at common law; *vide State v. Avery*, 7 Conn. 266; s. c., 18 Am. Dec. 105. So it is held that persuading to consent to incest without any act done toward actual consummation is not an indictable attempt. *Cox v. People*, 82 Ill. 181. So a person who induces one to sell him spirituous liquors, knowing that the seller is committing a misdemeanor, is not guilty of any indictable offense. *Commonwealth v. Willard*, 22 Pick. 467.

It is not however at all necessary in this case to decide in what cases a solicitation of another to commit a crime would be of itself a substantive crime at common law, or whether in any case such solicitation accompanied by no act tending to a specific crime could ever be an indictable attempt to commit such crime. But I will say that when the crime which one is solicited to commit has for its object an interference with public justice, for instance the procuring of a witness to absent himself from court so as to avoid testifying when he had been summoned to testify, there can be no doubt that at common law such a solicitation would be a misdemeanor in itself. *State v. Caldwell*, 2 Tyler, 212; *People v. Washburne*, 10 Johns. 160; *Walsh v. People*, 65 Ill. 58; *Jackson v. State*, 43 Tex. 421; *State v. Keys*, 8 Vt. 58; s. c., 30 Am. Dec. 450; *State v. Carpenter*, 20 Vt. 9; *State v. Early*, 3 Harr. 562; *Comm. v. Reynolds*, 14 Gray, 87; *Martin v. State*, 28 Ala. 71.

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In my judgment the fact that in the case of *People v. Bush*, 4 Hill, 134, it was proven in addition to the solicitation of the defendant to Kinney to burn the barn that the defendant furnished to Kinney a box of matches, wherewith to burn the barn, did not add the least strength to the case made out by the State. If the defendant had bought a box of matches with the declared intent to burn the barn, that would not have made him guilty of an attempt to burn the barn any more than the purchasing of a pistol with the intent of shooting a man would of itself make one guilty of an attempt to murder.

The case of *People v. Lawton*, 56 Barb. 126, based principally upon the case in 4 Hill, is in my judgment much less objectionable; and indeed it may properly be sustained on sound principles. But it certainly stands very near the boundary, when preparatory acts are to be held as indictable attempts, and when they should not be so held. The proof was that the prisoner had reconnoitered the premises and agreed with a witness at the trial that about ten o'clock of a particular night they would commit a burglary by entering the store of B.; that in pursuance of such design and agreement at the hour of one they went to the store through an alley in its rear; that the prisoner carried, or caused to be carried there, a set of burglar's tools to aid them in committing the burglary; that when they arrived the prisoner suggested that none of the tools were strong enough to enable them to force an entrance; that they then concluded to enter a blacksmith shop close by for the purpose of getting a crowbar or some other tool with which to break into the store; and that before they entered the shop an alarm was given and they were interrupted and were prevented from executing their intended purpose, not however abandoning their design. The court held that this evidence was sufficient to support a conviction. The court say in their opinion, p. 134: All the cases cited "concur in saying that in order to constitute the attempt there must appear to have been more than the design or intention to commit the offense. There must have been some ineffectual act or acts toward its accomplishment. Wharton Crim. Law, § 2702; 6 Grat. 706; 5 Cush. 367. But none of them tend to establish that acts analogous to those proved in this case do not constitute an attempt. The only case which appears in the least to conflict with it is the *nisi prius* case of *Regina v. Meredith*, 8 C. & P. 589, where Lord ABINGER said he thought some illegal act should be proved

to constitute the offense, and illustrated the suggestion by supposing that when a man was indicted for an attempt to have connection with a female child between the ages of ten and twelve years, and the proof showed he took his horse and rode to the place where the girl was he thought such an act would not constitute an attempt. We think the riding of the horse would not be an act toward the commission of the offense, while the taking of burglars' tools and crowbars to the place designed to be broken open would be acts done toward its accomplishment."

This reasoning is far different from that in *People v Bush*, 4 Hill, which the court afterward say covers this case completely. Certainly we can not infer from this reasoning that mere solicitations to commit a crime would make a party indictable for an attempt to commit such a crime. But we could infer the very reverse. Yet this was the ground on which this case in 4 Hill was based. If it were a sound ground, why did the court in the case in 56 Barb. inquire into the character of the preparatory acts, if the simple fact that the person had solicited or induced the witness to undertake the burglary would alone have made the prisoner guilty of an attempt to commit this crime? It seems to me quite clear that advice given to another, which he is at full liberty to accept or reject, cannot be regarded as an act toward the commission of a crime. For such advice would not apparently result in the usual course of natural events in the commission of the crime, and if it would not, then it seems to me it cannot legally be regarded as an act toward the commission of the crime. I am also inclined to think that the taking of burglars' tools to a store with intent to break it open without using them in any manner cannot legally be regarded as an attempt to commit burglary, because such an act, it seems to me, is not one which would apparently result in the usual course of natural events in the commission of the burglary. But it seems to me a nice question, and I may be mistaken in my first impression.

The case is thus stated in the syllabus of *Uhl v. Commonwealth*, 6 Grat. 706: "On an indictment against several for an attempt to burn a barn, held: That an attempt according to the true intent and meaning of the statute can only be made by an actual, ineffectual deed done in pursuance of and in furtherance of the design to commit the offense. But if the parties combined to commit the offense, and they all assented to it, and a part of them only went

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to do the act, those who were absent knowing with what intent the others went to the place, and assenting to the same, are principals in the offense. The overt act done in the attempt to commit the offense need not be the last proximate act prior to the commission of the felony attempted to be perpetrated." The general court in that case delivered no opinion and referred to no authorities. The syllabus is substantially the instruction given by the court below. The facts are not stated, and it therefore does not appear what, if anything, was done toward the burning of the barn by those who went there for the purpose.

In the *Commonwealth v. Clark*, 6 Grat. 675, the General Court decided that "An indictment for an attempt to commit an offense ought to allege some act done by the defendant of such a nature as to constitute an attempt to commit the offense mentioned in the indictment." No opinion was delivered by the court, nor are the facts sufficiently stated to ascertain accurately what the indictment stated, which the General Court quashed as insufficient. But as in the argument the New York cases were referred to, I presume the court by its decision intended to disapprove the case of *People v. Bush*, 4 Hill, which was decided some six years before this Virginia case.

It is very difficult to deduce from the cases we have cited, or from the reports of many other cases which I have examined but not cited, any principle so clear as to enable us to determine with certainty whether upon many states of facts in particular cases a party has or has not been guilty of an indictable attempt to commit a crime. But it seems to me that these cases show clearly enough certain general principles which when applied to the case actually before us will enable us to reach a distinct conclusion. In the first place there can be no question but that to solicit or in any manner induce a witness to absent himself from a trial in which the witness had been summoned to testify, is an indictable offense, though it is questionable whether in general the solicitation of a person to commit a crime is indictable, and it is clear that there are many crimes to commit which the mere solicitation would not be an indictable offense. If therefore the defendant below had induced by giving money, or by any other act attempted to induce the witness Earl to absent himself from the court on the trial of the indictment pending against the defendant below, whether this inducement came directly from the defendant below or indirectly

through Ran, she would clearly have committed an indictable offense. But the allegations in the indictment utterly fail to show that the defendant Caroline Baller either directly or indirectly did any thing to induce Earl, the witness, or which could have operated on his mind so as to induce him to absent himself from the court as a witness against the defendant. The allegation is that she gave Ran money for the witness to induce the witness to absent himself from court as a witness against her. But as there is no allegation that Ran gave this money to the witness, or ever even saw the witness, it is obvious that the giving of money to Ran for the witness to induce him to absent himself from court could have had no tendency to produce such result if the witness never received the money and Ran never spoke to him on the subject; and there is no allegation in the indictment that he ever did. If he had given this money to the witness to induce him to stay away from the court as a witness, then whether he had staid away or not, she could have been indicted for obstructing and impeding, or for attempting to obstruct or impede the administration of justice.

The authorities all agree that on an indictment for attempting to commit any crime it is not necessary in any case to allege or prove that the crime was actually committed; but the indictment in such case must specifically allege what the crime is which the accused is charged with attempting to commit or procure to be committed. The indictment in this case is entirely correct in this respect. It alleges that the crime, the committing of which the defendant attempted to procure, was "that Peter Earl should absent himself from the Circuit Court of Wood county at the February Term, 1883, to which said term he, the said Peter Earl, had been summoned as a witness on behalf of the State of West Virginia against Caroline Baller, the defendant, in a case pending in said court upon an indictment for misdemeanor against the said Caroline Baller, at the November term of said court 1882." This is an abundantly full and perfect description of the crime which it is alleged the defendant Caroline Baller attempted to induce Peter Earl to commit. The indictment did not allege that Peter ever committed this crime, and the authorities all show that there was no necessity that it should. The great weight of authority and reason, as we have seen, lay it down that the preparatory acts done by the accused, and which constitute the offense of attempting to procure the committing of a certain crime must be stated to have been actually done,

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and must be proven to have been done as stated. It is true that in the *People v. Bush*, 4 Hill, it was held that in an indictment for attempting to commit an offense, the particular facts which constitute the attempt need not be alleged. But this is contrary to both reason and authority. I have seen no other case in which this has been held to be law. In *Randolph v. Commonwealth*, 6 Serg. & R., it was decided otherwise, and the court said there were no precedents in support of such an indictment as was held good in 4 Hill; and in the *Commonwealth v. Clark*, 6 Grat. 675, the position taken in 4 Hill was condemned, for the court expressly held: "The indictment for the attempt to commit an offense ought to allege some act done by the defendant of such a nature as to constitute an attempt to commit the offense mentioned in the indictment."

In the case before us the indictment does allege some act done by the defendant which it was claimed in argument was "of such a nature as to constitute an attempt to commit the offense mentioned in the indictment."

In the case before us the indictment does allege some act done by the defendant, which it is claimed in argument was "of such a nature as to constitute an attempt to commit the offense mentioned in the indictment." The act done by the defendant alleged in the indictment and claimed to be of such a nature as to constitute the attempt to get Peter Earl to commit the offense of absenting himself from attendance at the Circuit Court as a witness against the defendant was that "she did unlawfully furnish one Ran with money for Peter Earl to induce him to commit said offense." And the question is: Was this of such a nature as to constitute an attempt to commit this offense? It seems to me clear, both on reason and the authorities, that it was not. The act done by the accused alleged in the indictment, it would seem obvious, can not be independent and unconnected in any manner with the acts, which if done would constitute the crime which the accused is indicted as having attempted to commit or procure to be committed. The weight of authority, as I have stated, seems to show that these acts done by the defendant and the acts constituting the crime attempted should be the cause of the other. But an examination of the cases which we have cited shows that there are some cases which have been decided which seem to hold that the acts done by the defendant should be related to the acts which constitute the crime attempted, not as crime necessarily, but that it will suffice,

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if the first is only a condition of the other. Of this character apparently are the cases of *People v. Bush*, 4 Hill, 134, and *People v. Lawton*, 56 Barb. 126. But I have seen no case which intimates that the acts done by the accused need not be related to the acts constituting the attempted crime either as causes or as conditions.

In the case before us these acts done by the defendant are neither the cause nor a condition of the acts constituting the crime alleged to be committed. A condition of any crime is the act or acts without which it would not have occurred. A cause is that condition which determines the final result, or it may be defined as the preponderating condition. See 1 Wharton Crim. Law, (8th ed.) V, §§ 153, 154. We have already given illustrations of causes and conditions which will, I think, suffice to show what is meant by these words. In *Washington v. B. & O. R. R. Co.*, 17 W. Va. 197 *et seq.*, many cases are cited which when carefully considered will enable us to distinguish between what is properly called a cause and what should be called a condition merely. Though in these cases cited and in the case of *Washington v. B. & O. R. R. Co.*, there is no attempt to draw formally the distinction between a cause and a condition; and I do not know that the term "condition" is used in any of the cases. Still in very many of them certain facts stated in them as not causes are still connected with the result; and this remote connection not being a cause is what we here call a condition. But it is apparent that the fact as alleged in the indictment, that "Caroline Baller," the defendant below, "on the first day of January, 1883, in said county of Wood, did unlawfully furnish to one John A. Ran for the use of Peter Earl, an amount of money, to wit, the sum of \$3 to unlawfully induce the said Peter Earl to absent himself from the Circuit Court of said county at the February Term, 1883, of said court," could not possibly be either a cause or a condition of his, Peter Earl's, absenting himself from the Circuit Court of Wood at the February term, 1883, unless Ran gave these \$3 to Earl to induce him to so absent himself, or saw said Earl, and by his communication with him endeavored in some manner to influence him to absent himself from said term of said court. If Ran never saw Earl then of course the giving of this money by the defendant below for this alleged purpose could not possibly have operated in any manner to induce said Earl to absent himself from the said term of said court to avoid being a witness against the defendant.

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The two acts, the giving of the money by the defendant below for this illegal purpose and the absenting of Earl from this term of the Circuit Court, are entirely independent acts, and the one could not possibly influence the other, if Earl was in no manner communicated with; and there is no allegation in the indictment that he was. In the absence of any such allegation the simple giving of this money by the accused to a third person for Earl is a fact of such a nature that it could not possibly constitute an attempt to induce Earl to commit the offense of absenting himself from the Circuit Court as a witness against the accused. The indictment really amounts to nothing more than that the accused intended to induce Earl, a witness against her in an indictment there pending, not to appear as a witness against her, and indicated this intention by a certain transaction which she had with a third party. Of course she can not be indicted, as all the authorities show, for entertaining such intention, however immoral it may be regarded, and however clearly it may be shown that she did entertain it. This being the case, the Circuit Court ought to have quashed this indictment when her counsel moved the court to quash it on July 19, 1883.

For this reason the judgment of the court below, rendered on August 6, 1883, must be reversed and annulled, and this court proceeding to render such judgment, as the court below ought to have rendered, must quash this indictment.

Indictment quashed.

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(23 W. Va. 422.)

Statute— "spirituous liquors."

Cider or crab-cider is not a "spirituous liquor," nor of "like nature as wine, ale, porter or beer." (See note, p. 86.)

CONVICTION of selling spirituous liquors without license.
The opinion states the case.

McCorkle & McCorkle and Watts & Camden, for plaintiff in error.

Alfred Caldwell, attorney-general, for State.

WOODS, J. L. B. Oliver was indicted in the Circuit Court of Kanawha county for selling in that county without a State license therefor "spirituous liquors, wine, porter, ale, beer, and drinks of like nature," against the peace, etc. To this indictment the defendant pleaded not guilty, and neither party requiring a jury, by consent of parties the cause was tried by court in lieu of a jury, and having heard the evidence and argument of counsel, the court found the defendant guilty, who thereupon, and before judgment, moved the court to arrest the judgment and to set aside its finding, because the same was contrary to the law and the evidence, and award him a new trial, which motions the court overruled, to which rulings of the court the defendant excepted and filed his bill of exceptions, wherein all the facts proved at the trial are certified by the court, which then entered upon its finding a judgment against the defendant for a fine of \$10 and the costs of the prosecution.

To this judgment the defendant obtained a writ of error.

It appears from the defendant's bill of exceptions that the State to maintain the issue on its part proved the following facts: "That the defendant Oliver, in the county of Kanawha, within a year before the finding of the indictment, sold crab-cider once to one party and received pay therefor, and said cider when drunk in large quantities will intoxicate, and in sufficient quantities is intoxicating," and this was all the evidence in the cause.

The plaintiff assigns as error,

First. That crab-cider is not embraced within the meaning of the statute prohibiting the sale of "spirituous liquors, wine, porter, ale, beer, or drinks of like nature," and

Second. If it is so embraced, the facts proved were insufficient to convict him of the offense charged in the indictment.

The second ground of error is easily disposed of, for if crab-cider is a spirituous liquor, or wine, or a drink of like nature of either, or of porter, ale or beer, then it would seem clear that he was rightfully convicted, for there is no doubt that the court acting in lieu of a jury was fully warranted in finding that he did sell crab-cider in Kanawha county to some person within one year before the finding of the indictment.

The only material question here presented for consideration is whether by proper construction of the statute in regard to the sale of spirituous liquors, etc., without license, the sale of crab-cider is

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prohibited. But for the provisions of this statute, the sale of all these liquors would be lawful; every one would be at liberty to engage in the traffic in them that was inclined to do so, as in the traffic of every other article of commerce; but because the unrestricted sale of spirituous liquors leads to great domestic and social evils, the legislature has, in its wisdom, from time to time regulated, restricted and even prohibited the traffic in spirituous and other liquors by requiring special licenses to conduct the business and imposing fines and penalties upon such persons as engage in this business without being specially authorized to do so. Unless restrained by constitutional inhibitions from doing so, the power of the legislature to restrict, limit or even prohibit the traffic in spirituous liquors is unquestionable. But as the traffic in spirituous liquors is not in itself unlawful, and is only made so by positive enactments, restricting, limiting or prohibiting the same, we must look to the enactments themselves and form our conclusions by a fair and just interpretation of their provisions as we find them upon the statute book.

While there is no direct proof wherein crab-cider in any respect differs, if at all, from common cider, yet it seems to be a fact admitted on the part of the State, that crab-cider is cider made from the crab apple, wild or cultivated.

It is not going too far to assert that among all the artificial or manufactured beverages in common use in this State, and we may add in the United States, the expressed juice of the apple or "cider," is the most common, the least expensive, and the most harmless; in its unfermented state it is absolutely innoxious, and even when fermentation has commenced, unless arrested, it is very soon changed into vinegar. This common beverage, found in every locality, used more or less at certain seasons by all classes of our people, as well for many culinary purposes as for a beverage, would naturally be present in the mind of every legislator who was endeavoring to classify and arrange such artificial drinks, the traffic in which he would deem hurtful to the public and which ought to be restricted, limited, or prohibited altogether. The same would be true of distilled spirits of every kind, whether known as alcohol, whisky, rum, brandy, gin, and all combinations or mixtures thereof as the foundation or active principle in all of them, would necessarily be the free alcohol entering into their composition; with these he would naturally associate other liquors in common use,

not the result of distillation, but such as by experience and observation were found to contain appreciable quantities of alcohol, and to produce intoxication, such as wine, and the different forms of drinks manufactured from malted grain of various kinds and commonly called ale, porter, or beer.

The first section of chap. 107 of the acts of the Legislature, 1877, declares that "No person without a State license therefor, shall * * * sell, offer or expose for sale spirituous liquors, wine, porter, beer, or any drink of a like nature. And all mixtures or preparations known as 'bitters,' or otherwise, which will produce intoxication, whether they be patented or not, shall be deemed spirituous liquors within the meaning of this section."

It will be observed that four classes of liquors are here designated:

First, "spirituous liquors," including all mixtures known as "bitters" or otherwise, which will produce intoxication; second, wine; third, ale, porter, beer; and fourth, any drink of a like nature.

The words "spirituous liquors" do not include wine or other fermented liquor, for they imply that the beverage is composed in part or fully of alcohol extracted by distillation. Bishop on Statutory Crimes, § 1009. Wines may or may not be spirituous — depending upon the absence or presence of alcohol in each evolved in the process of the fermentation of the juice of the grape or other fruit out of which it is made. Ale, porter and beer are neither the result of distillation nor of the fermentation of the juice of any kind of fruit. Webster defines beer — "a fermented liquor made from any kind of malted grain, with hops or other flavoring matters; also as a fermented extract of the roots and other parts of various plants, as spruce, ginger, sassafras." He defines ale to be a liquor made from an infusion of malt by fermentation, differing from beer in having a smaller proportion of hops. In like manner he defines "porter" to be a "malt liquor of a dark brown color, moderately bitter and possessing tonic and intoxicating qualities." From these definitions it will be perceived that ale, porter and beer are drinks of like nature, differing from but similar to each other, but wholly different from spirituous liquors and wine. How many other different drinks of like nature may be made from different malted grains or mixtures thereof, or from grains differently malted and flavored, or whether they would in a greater or less degree than

ale, porter or beer produce intoxication, we have no means of determining. All spirituous or distilled liquors, and all wines, being by the terms of the act embraced within the prohibition, other drinks could not be of a like nature without at the same time being of the same nature, and if of the same nature it would be a useless proceeding to describe them as drinks of like nature. But when the words "drinks of like nature" are applied to ale, porter and beer, they will include all similar preparations made by similar process of fermentation of similar nature, for then we may reasonably conclude they will be of like nature, and if of like nature, then by the terms of the act they are within the prohibition thereby imposed upon the sale thereof.

Cider is neither produced by distillation nor by fermentation, and although liable to fermentation, and when subjected to distillation it is capable of producing a spirituous liquor, yet the ultimate product is no more like cider than rum is like the juice of sugar-cane from which it is manufactured; neither is cider the result of any process of fermentation whatever, nor is it in any proper sense a mixture of any liquor other than water, which is common to all spirituous liquors, wines, ale, porter, beer and all drinks of like nature. Not being a distilled liquor, neither is it a mixture known as "bitters," or otherwise, which will produce intoxication, and therefore declared for the purpose of the act "spirituous liquor." Nothing can be so included unless both of these qualities unite in it; first it must be a mixture, second, a mixture which will produce intoxication. Being the unadulterated juice of the apple, it is no mixture, and under ordinary circumstances incapable of producing intoxication, it cannot be classed as a spirituous liquor, neither can it with any degree of propriety be called "wine," and it is wholly unlike any fermented liquor made from a malted grain, or from the roots of plants or the bark of trees, as spruce, ginger, sassafras, birch and sarsaparilla. It must be observed that the act of the legislature lays no stress whatever upon the fact that any of the liquors mentioned or included in it, the selling of which without license is prohibited, are "intoxicating." It is therefore wholly immaterial whether all or any of them are intoxicating or not, and no inquiry as to this fact can be entered into; and it would be no defense if the accused were able to prove that any of the prohibited liquors was absolutely free from all intoxicating qualities. The unlicensed sale of any or all of them is unlawful,

because the legislature has so declared, and not for any other reason. With the motives which induced the legislative mind to include in its prohibition the sale of spirituous liquors, wine, ale, porter, beer and any drink of like nature, and fail to include cider, we have nothing to do, nor are we in any degree responsible for what they have done, or what they may have failed to do, nor have we any authority or disposition to supplement their work by a strained judicial construction which will extend its prohibition to subjects not clearly embraced by it, even if we are of opinion that it would have been wiser or better for them to have done so. The very fact that in all the various modifications of this statute, no legislature has ever ventured to include cider among the prohibited drinks, is a strong argument against the proposition so ably argued by the attorney-general, that it is included and prohibited by the words "any drinks of like nature," and when considered in connection with the early legislation of Virginia on this subject, is conclusive in our mind against it.

[Omitting this discussion.]

The attorney-general, in his learned argument, has referred the court to a large number of adjudicated cases in various States, wherein some branches of this subject have been considered, but after a careful review of them he frankly admits they do not afford much assistance here to the court upon the point now under consideration, as they have been made upon statutory provisions there existing which do not exist in this State. We have carefully reviewed all these cases and we find that all of them have been decided with reference to the effect or operation of some particular statute not in operation in this State. This is especially true of the cases of *State v. Starr*, 67 Me. 242; *State v. Page*, 66 Me. 418. *State v. McNamara*, 69 Me. 133; *State v. Preston*, 48 Vt. 12; *Rau v. People*, 63 N. Y. 277. *State v. Packer*, 80 N. C. 439, was an indictment for selling "intoxicating liquors," and the proof showed that the liquor sold was port wine, and this was properly held to be "intoxicating liquor."

State v. Lowry, 74 N. C. 121, was an indictment for selling spirituous liquors, and the proof showed the sale was of domestic blackberry wine, and the court held that whether such wine was spirituous liquor was a question for the jury.

Godfriedson v. People, 88 Ill. 284, was an indictment for selling "intoxicating liquors" and the proof was that the liquor sold was

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a kind of malt liquor of an intoxicating quality called "pop." The jury found the defendant guilty upon each of twelve counts in the indictment, and the court held the conviction proper.

State v. Biddle, 54 N. H. 379, was an indictment for keeping for sale "intoxicating liquors," and the proof showed that the liquors kept for sale were ale and cider. The trial court ruled that ale and cider after fermentation is completed are "intoxicating liquors," without proof of the amount of alcohol which they contain; but the Supreme Court reversed this judgment of the trial court, and held that whether they are intoxicating or not is a question for the jury. *State v. Reynolds*, 47 Vt. 297, was an indictment for owning, keeping and possessing intoxicating liquors with intent to sell the same, etc., and the court held that by the terms "intoxicating liquors," any kind of liquor that would intoxicate was included. *The Board of Commissioners of Excise of Tompkins county v. Taylor*, 21 N. Y. 173, was a prosecution for selling without a license "strong or spirituous liquors," and the court held that "strong beer," or any liquor is within the statute, whether fermented or distilled, of which the human stomach can contain enough to produce intoxication.

Commonwealth v. Bos, 116 Mass. 56, was an indictment for keeping a tenement used for the illegal sale of "intoxicating liquors," and the proof was that the liquor sold was neither distilled spirits, ale, porter, strong beer, nor lager beer, but was an entirely distinct and different article, and recognized as such in the trade, containing not more than half the stock as lager beer, and known as "schenk beer," which was fit for use in a short time after it was brewed; the court held that whether the liquor sold was intoxicating or not was a question for the jury, and the fact that although alcohol was discovered in it upon chemical analysis, though competent evidence, does not necessarily prove that the liquor sold was "spirituous" within the statute.

In *Commonwealth v. Dean*, 14 Gray, 99, which was also an indictment for selling "intoxicating liquors," and the proof was that the liquor sold was unfermented cider; it was held that the trial court correctly refused to instruct that the sale of unfermented cider was not prohibited, because by the express words of the statute it was declared that "ale, cider, and all wines" should be considered intoxicating within the meaning of the act. From this review of these cases we find no reason to cause us to doubt the cor-

rectness of the conclusion which we have already announced. Nearly all of these cases are for selling "intoxicating liquors," while as we have already shown, under our statute it is wholly immaterial whether they are intoxicating or not, if not embraced within the list of spirituous liquors, wine, porter, ale, beer or drinks of like nature. While we are not called upon to decide, and we do not decide what drinks are embraced in the terms "any drinks of a like nature," yet we are of opinion that cider or crab-cider is not one of the drinks intended to be prohibited as one of "the drinks of like nature" mentioned in the statute. The judgment of the Circuit Court of Kanawha is therefore reversed.

And this court, proceeding to render such judgment as the said Circuit Court ought to have rendered upon the facts certified, do find the defendant not guilty, and judgment must be entered for the defendant.

SNYDER, J., dissented.

NOTE BY THE REPORTER.—See *Intoxicating Liquor Cases*, 25 Kans. 751; s. c., 87 Am. Rep. 284.

"Spruce beer, spring beer, ginger beer, and molasses beer" may properly be termed fermented beer; but they are never considered "strong liquors or intoxicating beverages." *Nevin v. Ladue*, 8 Denio, 487. The opinion by Chancellor WALWORTH is one of the most learned and amusing in the books.

Ale is not "spirituous liquor," because produced by fermentation and not by distillation. *People v. Crilley*, 20 Barb. 246; *State v. Adams*, 51 N. H. 568; *State v. Moore*, 5 Blackf. 118. But ale and "strong beer" are strong or "spirituous liquors," in Chancellor WALWORTH's opinion. *Nevin v. Ladue, supra*. "Ale, beer, porter, rum, gin, brandy, whisky and wine" are "intoxicating liquors." *State v. Wittmar*, 12 Mo. 407. Courts take judicial notice that beer is a malt and intoxicating liquor. *Briffit v. State*, 58 Wis. 89; s. c., 46 Am. Rep. 621; *State v. Jenkins*, 82 Kans. 477.

Lager beer is a malt liquor. *State v. Goyette*, 11 R. I. 592; *Watson v. State*, 55 Ala. 158; and it is a "strong and malt liquor," and it is "intoxicating." *State v. Rush*, 13 R. I. 198. But it is not a spirituous liquor." *State v. Thompson*, 20 W. Va. 674. The court there said: "The phrase 'spirituous liquors' in its ordinary sense means liquors composed in part or fully of alcohol produced by distillation as distinguished from fermented and malt liquors, and in this sense it never includes porter, ale, beer or wine." But it is a question of fact whether it is intoxicating. *Rau v. People*, 63 N. Y. 277. Beer is not necessarily a "malt liquor." *State v. Beswick*, 13 R. I. 211. The court here said: "We do not think there is any presumption of law that when a man speaks of beer he means a malt liquor, but we think what he means is purely a question of fact for the jury. It is a matter of common knowledge that there are beverages containing neither malt nor any other intoxicating ingredients which are called beers."

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Generally, wine is an "intoxicating liquor." *State v. Packer*, 80 N. C. 489; but not in Iowa, when made from native grapes, currants or fruits. *Worley v. Spurgeon*, 38 Iowa, 465. And in Indiana the court do not know whether wine is "intoxicating;" *Jackson v. State*, 19 Ind. 812; although they know that "spirituous liquors" are. *Carmon v. State*, 18 Ind. 450.

Cider is not a "vinous liquor." *Feldman v. Morrison*, 1 Bradw. 460; "vinous liquors" being those made from grapes. *Adler v. State*, 55 Ala. 16.

Whisky is "intoxicating." *Eagan v. State*, 53 Ind. 162; and courts take judicial notice of it. *Schlicht v. State*, 56 Ind. 174.

"Old Tom gin" is "spirits." *Winning v. Gow*, 82 U. Can. Q. B. 528; and "spirits" are "spirits" although diluted with water. *Scott v. Gilmore*, 8 Taunt. 226. But "sweet spirits of nitre" are not "intoxicating." *Att'y-General v Bailey*, 1 Exch. 292

Where strong drink ceases to be such and becomes medicine is discussed in *State v. Laffer*, 38 Iowa, 422. It is there held that so long as liquors retain their character as intoxicants, capable of use as beverages, notwithstanding other ingredients, roots or tinctures may have been mixed therewith, they fall under the ban of the law, and are still considered intoxicating liquors; but when they are so compounded with other substances as to lose that distinctive character, and are no longer desirable for use as stimulating beverages, then they are medicine

In the dissenting opinion in the principal case, SNYDER, J., observed: "The very section under which the indictment here was found uses the terms 'intoxicating drinks' and mixtures 'which will produce intoxication,' and expressly prohibits their sale without a license. These terms are general and the proscribed drinks and mixtures are not otherwise described or designated than as intoxicating. If they are 'intoxicating' or will 'produce intoxication,' they are prohibited, and if they are not, they are not inhibited. Therefore if cider or a mixture composed of cider and something else will produce intoxication, then, even though the thing mixed with the cider is entirely free from intoxicating ingredients, the sale of cider or such mixture requires a license under the statute. It necessarily follows from this conclusion that if the decision of the majority of the court is correct, a person may be indicted and convicted for selling cider at a public theatre, or when mixed with molasses and ginger, yet if it is sold unmixed at any other time and place, although it may be proven to be intoxicating in the one case as much as in the other, he can not be indicted or convicted. And upon such construction these contradictions and inconsistencies exist not only in the same statute but in the same section and in part in the same sentence of the same section.

"It seems to me that no one can read this statute even carelessly without an absolute conviction that it was intended by this statute not simply to produce revenue, but that the primary and principal object was to regulate and suppress as far as practicable the unrestricted and irresponsible sale of liquors or drinks, not because they are composed of specific ingredients or made in a certain manner or designated by particular names, but because and only because they produce intoxication.

"In my view it is altogether unimportant and unnecessary to indulge in any

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speculation or analysis as to the constituents or ingredients of which the liquors or drinks mentioned in the statute are composed, the manner in which they are made or manufactured, or the difference or similarity between them and others not specifically mentioned in it. The real test furnished by the true interpretation of the statute itself is, whether or not the liquor or drink in question is intoxicating. If it is, such drink is proscribed; if it is not, and is not one of the specific liquors or beverages named in the statute, then it is not proscribed. Certain liquors or beverages were known to the legislature from common observation, if not from experience, to be capable when drunk of producing, and which do generally result in, partial or total intoxication. These are positively and by name proscribed. Any inquiry as to the effects of these are placed by the statute beyond the control of the courts or juries; but as new intoxicants might be invented and as some liquors or drinks may in one form or state of fermentation produce intoxication, while in other conditions they may not, it was impracticable for the legislature to foresee and provide for such drinks. The statute therefore intending to proscribe all intoxicating liquors and drinks, without interfering with those that may not be so, employed this explicit and comprehensive language: 'No person without a State license therefor shall * * * sell, offer or expose for sale, spirituous liquors, wine, porter, ale or beer, or any drink of a like nature.'

"Now it is a matter of common observation and general knowledge that each and all of the beverages specifically named in the statute are intoxicating when drunk in less or greater quantities, and it is also equally well known that they contain no other quality common to each and all of them. They are each and all intoxicating in their nature, but they are not all of the same nature in any other respect. The conclusion therefore is inevitable that no other drink can be of 'a like nature' with these in the language and intent of the statute unless it be intoxicating, as that is the only quality common to all of them.'

"Upon the whole case and in view of the past history of the legislation on this subject, the language and spirit of the statute under consideration, the evil sought to be prevented and the common sentiment of the people generally it seems to me but little short of absurd to contend that this statute 'lays no stress whatever upon the fact that any of the liquors included in it are intoxicating.' On the contrary every consideration which can properly be invoked in its construction inevitably leads to the positive conclusion that the great and paramount object and design of the legislature in adopting it was to restrain, not by absolute and indiscriminate prohibition, but by a process of regulation and restriction, the sale of any and every kind of intoxicating liquors and beverages. *Board of Commissioners v. Taylor*, 21 N. Y. 178; *Rau v. People*, 63 N. Y. 277; *State v. Reynolds*, 47 Vt. 297; *Godfriedson v. People*, 88 Ill. 284.

"Crab-cider not being one of the drinks proscribed by name in the statute, the question whether or not it was intoxicating was one of fact to be determined by the jury, or the court acting in lieu of a jury, from the evidence in the case."

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(26 W. Va. 447.)

Vendor and purchaser — failure of title of part — mistake.

Where there is a contract for sale of several adjoining parcels of land for an entire sum, with general warranty of title, and the purchaser is evicted from a portion for want of title, he may hold the remainder and have proportionate abatement or compensation, although there was a mutual mistake as to the title.

SUIT to enforce bonds for purchase money. The opinion states the case.

W. E. Arnold, for appellants.

W. G. Bennett, for appellee.

SNYDER, J. In January, 1859, Jacob J. Jackson made his will, which was afterward duly probated in Lewis county. By the second clause of the will the testator devised to five of his children, viz., Elizabeth, George W., Margaret Drusilla, Cecelia B. and Jacob W., the farm on which he then resided, subject to dower of his wife, Pamela F. Jackson, therein, providing therein that the farm should be used for the support of said children until the youngest should arrive at the age of twenty-one years, and that then it should be held either jointly or severally by the said children, "and in case of the death of any of them, that his or her share shall pass to their heirs in the same manner it would under the law without this devise;" and that one of said children, Jacob W., died in the year 1866 intestate and without issue; another one, Margaret Drusilla, married Robert E. Bush in 1871, and died in April, 1872, intestate and without issue, leaving her husband surviving; by written contract, dated February 1, 1873, John C. Jackson, also a son of said testator and half brother of the above-named devisees, sold to Jasper Peterson and agreed to convey to him by deed, with general warranty, in consideration of \$6,000, the following property:

First. The dower estate of the widow of said Jacob J. Jackson, deceased, set apart by decree to her in the farm aforesaid.

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Second. The undivided interest of said George W. Jackson in said farm, subject to the said dower therein.

Third. "All the undivided interest of the said John C. Jackson which descended to him on the deaths of the said Jacob W. and Margaret Drusilla, and supposed to contain about fifty-two acres, being the land of which they were seised at the times of their deaths and the same that was devised to them by their father, Jacob J. Jackson."

Fourth. A tract of twenty-five acres adjoining the said dower land.

Fifth. The interests which descended to George W. Jackson upon the deaths of his half brother and sister, the said Jacob W. and Margaret Drusilla, in the farm which was devised to them by their father, Jacob J. Jackson; and

Sixth. The interest of said John C. Jackson in the wheat crops sown on parts of said lands by tenants. The value of these crops was shown by the proof not to exceed \$8.

By deed, dated September 29, 1874, the said John C. Jackson and wife conveyed the aforesaid real estate to said Peterson with covenant of general warranty, retaining therein a lien to secure the payment of two bonds of \$1,000 each for unpaid purchase-money. These bonds were assigned by John C. Jackson to G. J. Butcher and W. L. Dunnington, trustees, and in May, 1875, they brought this suit in the Circuit Court of Lewis county against said Peterson and John C. Jackson, to enforce the payment of said bonds by a sale of the land.

The defendant Peterson answered and also filed his cross-bill, making the said Robert E. Bush a party and averring that the said Bush, as the surviving husband of said Margaret Drusilla, claimed he was the heir of his late wife and as such, under the will of Jacob J. Jackson, he was the owner of the interest which descended from the said Margaret Drusilla at her death and which was a part of the land sold and conveyed by said John C. Jackson to said Peterson. He also averred in his cross-bill that said interest so claimed by said Bush was worth at least \$2,500, and asked that the right to said land might be ascertained, and if it should be determined that the said Bush was entitled thereto, that the value thereof might be set off against the said bonds for the purchase-money.

Before the merits of this cause were decided a decree was entered in another cause, which was subsequently heard with this, by

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which it was adjudicated and determined that the said interest of said Margaret Drusilla in said land upon her death passed to and vested in her husband, the said Robert E. Bush, and thereby the said Peterson lost and was judicially evicted from a portion of the land described in the third and fifth items of said contract of sale.

The cause was referred to a commissioner, and he reported that the whole land embraced in the sale and conveyance from John C. Jackson to Peterson amounted to one hundred and sixty-eight acres of dower and one hundred and thirty-four acres in fee, and that the quantity from which the said Peterson was evicted by said Bush was forty-four acres, of the relative value of \$1,443.26, upon the basis that the whole land sold was of the value of \$6,000, the purchase-price. There was no exception to this report.

On October 28, 1882, the court being of opinion that Peterson was entitled to an abatement from the contract-price of his purchase on account of the interest of Margaret Drusilla, from which he had been evicted by the said Robert E. Bush (but by reason of the equities arising between the plaintiffs, Butcher and Dunnington, trustees, and said Peterson, the latter should be required to pay to the said plaintiffs the entire unpaid amount of said two bonds, which was done), thereupon decreed that said John C. Jackson pay to said Peterson the said sum of \$1,443.26, reported by the commissioner, with interest thereon from the date of said eviction and the costs of the suit. From this decree the said Jackson obtained this appeal.

The appellant has assigned and argued the following grounds for the reversal of said decree.

First, that the contract of sale was based upon the mutual mistake of the parties;

Second, that the sale was in gross and at the hazard of the purchaser; and

Third, that the contract embraced different subjects for an entire consideration, and there was therefore no way of ascertaining the abatement to be made for the portion lost by the vendee.

First. It is insisted by the appellant that the parties were mutually mistaken as to the interest of the vendor in the land from which he was evicted by Bush; that this mistake was one either of law or of fact; if a mistake of law, no relief could be granted, and if a mistake of fact, the only relief which a court of equity could grant would be to rescind the contract of sale.

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The doctrine which denies relief upon contracts entered into upon mistakes of law so fully argued in this cause, has no application here, for the reason that the vendee is protected by the express warranty of title by the grantor. It is immaterial that the vendee had knowledge of all the facts in relation to the title, and that he accepted the conveyance or made the purchase, believing that said facts did not impair the title. When a purchaser has notice of a defect or incumbrance and requires from the vendor a warranty, the presumption of law is that the covenant was expressly taken against such known defects or incumbrances. Rawle Cov. Title, 566; *Jackson v. Ligon*, 3 Leigh, 161. If the purchaser had failed to contract for an express warranty, then this doctrine might apply; but to contend in the face of the positive covenant of *Jackson*, that Peterson should be denied relief because he had knowledge of facts which in law destroys the title to a part of the land purchased, would be to deprive him of the benefit of his warranty. The covenant of general warranty, unless qualified by the contract, in terms is a protection against defects of title whether they result from mistakes of law or mistakes of fact.

In regard to the rule upon which courts of equity rescind contracts of sale where there is a mutual mistake of the parties in entering into the contract it is well settled that such mistake must be of the substance of the thing contracted for, it must be such that the purchaser cannot get what he substantially bargained for, or the vendor would be compelled to part with what he had no idea of selling. *Glassell v. Thomas*, 3 Leigh, 113; *Graham v. Hendrew*, 5 Munf. 185; *Lamb v. Smith*, 6 Rand. 552; *Crislip v. Cain*, 19 W. Va. 440, 474. But if the mistake does not affect the substance of the contract so as to defeat the main purpose of the contracting parties, this rule has no application. In all cases courts of equity look to the substance of the contract, and do not permit small matters of variance to interfere with the manifest intention of the parties, especially where full compensation can be made on account of the loss or deficiency in the land sold. Equity will decree specific performance even in cases of executory contracts at the suit of the vendee where the vendor is incapable of making a complete title to all the land sold. The general rule in such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and have an abatement of the purchase-money, or compensation,

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for any deficiency in the title, quantity, quality or description of the estate. In such cases however the purchaser, if he elects to have such performance, can have relief only upon equitable terms. 2 Story Eq. Jur., § 789; *Hill v. Buckley*, 17 Ves. 394; *Waters v. Travis*, 9 Johns. 465.

In the case of *Clark v. Reins*, the court, quoting from Lord ELDON in *Mortlock v. Butler*, 10 Ves. 292, 316, says: "If a man having partial interests in an estate chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent for him to say afterward, though he has valuable interests he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion of his contract; and if the vendee chooses to take as much as he can have he has a right to that and to an abatement." 12 Grat. 111; *Wood v. Griffith*, 1 Swanst. 43, 54.

The principles to be deduced from the foregoing and other authorities, many of which are referred to in *Crislip v. Cain*, *supra*, may be stated as follows: First, when the contract is a sale in gross for an entire sum, if it is subsequently ascertained that there is either a deficiency or an excess in the quantity of the land specified therein, and it is shown that the error in quantity arose from the mutual, innocent mistake of the parties, a court of equity may, where the mistake affects the substance of the sale, rescind the contract, but in the absence of fraud, actual or constructive, in either party, such court can allow no abatement for a deficiency or compensation for any excess in the land. *Hansford v. Coal Company*, 22 W. Va. 70.

Second. If however in the case of such sale the purchaser loses a part of the land purchased by him because the vendor had no title to the part so lost, and such part is not a substantial part of the land contracted for, then neither the vendor nor the vendee can have the sale rescinded in a court of equity, even though the parties were mutually mistaken as to the title of the part of the land lost. But if in such case the sale is without warranty of title and the vendee refuses to rescind the sale, he will not be decreed compensation for the land so lost. *Bailey v. James*, 11 Grat. 468.

Third. But if in the case last stated the vendor has warranted the title, and the portion lost is much or little, the vendee may elect to hold so much of the land as he can and compel the vendor

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to abate the purchase-money, if unpaid, or if paid, to make compensation for the land so lost by reason of want of title or right in his vendor. *Att'y-Gen. v. Day*, 1 Ves. 218; *Roffery v. Shallcross*, 4 Madd. 227; *Beverly v. Lawson*, 3 Munf. 317.

In the case at bar the deficiency in the land sold arose from the want of title in the vendor, Jackson, to the portion lost; the sale was with warranty of title, and the vendee, Peterson, has elected to hold the portion to which Jackson has made him a good title with compensation for the portion lost; this brings the case within the principle of the last proposition above laid down, and the Circuit Court did not err in so decreeing.

[Omitting minor matters.]

Judgment affirmed.

WILLIAMS V. COUNTY COURT.

(28 W. Va. 433.)

Taxation — injunction to restrain collection of illegal tax.

At the suit of one or more dog-owners, on behalf of themselves and all other dog-owners in the county, an injunction may issue to restrain the collection of a dog-tax on the sole ground of illegality, in order to prevent a multiplicity of suits. (*See note, p. 110.*)

SUIT by Williams and others, on behalf of themselves and other tax-payers, for injunction against the collection of a tax. The opinion states the case. The injunction was granted below.

F. M. Reynolds, for appellant.

George E. Price, for appellee.

GREEN, J. This was an injunction to stop the collection of what is known as the dog-tax levied by the County Court of Grant county under chap. 23 of the acts of 1881, and to restrain the County Court of Grant from appropriating any money arising from this dog-tax or from any other source to the payment of losses to private individuals by the destruction of sheep by dogs, and to restrain the sheriff of said county from paying out for said purpose any funds that might come into his hands from this dog-tax. This act by its tenth section (see p. 270 of acts of 1881) provided that

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it should not take effect in any of twenty-eight counties therein named until the same was adopted by a vote of the people of such county in the manner provided in the eleventh section of this act. But Grant was not one of these twenty-eight counties, so that this act was in operation in Grant county from its passage, March 11, 1881, provided such act is not null and void because unconstitutional. The county court of Grant, as shown by the bill, levied this dog-tax on June 16, 1881.

The principal question intended to be raised by the bill in this cause is: Was this act of March 11, 1881 (chap. 23 of acts of 1881), constitutional? Before considering this question we must first consider whether it is properly raised in a suit of this character, and if so, whether there are the necessary and proper parties to this cause to justify this court in deciding in this cause whether said act is or is not constitutional.

I shall therefore first consider whether a court of equity will enjoin the collection of a county tax, which has been illegally and unconstitutionally assessed, or will leave each tax-payer severally to his legal remedies, after the tax has been wrongfully enforced against him. It may be regarded as well settled that the mere illegality of the tax complained of or its injustice or irregularity of itself gives no right to an injunction in a court of equity. To entitle a party to such relief, he must bring his case under some acknowledged head of equity-jurisdiction. *Dow v. Chicago*, 11 Wall. 108; *Hannerwinkle v. Georgetown*, 15 Wall. 548; *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Easton*, 98 Mass. 469; *Lovell v. Charlestown*, 99 Mass. 208; *Whiting v. Boston*, 106 Mass. 89; *Hannersville v. Charlestown*, 106 Mass. 350; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Baltimore v. Baltimore & Ohio R. Co.*, 21 Md. 50. But there is a large number of decisions by courts of the greatest respectability to the effect that if a party or parties bring such a suit properly they place themselves and their cause under an acknowledged head of equity jurisdiction, the avoiding of a multiplicity of suits, and are therefore entitled to an injunction to stay the collection of such illegal and unconstitutional tax. On the other hand there are many equally respectable courts who refuse to grant an injunction or entertain jurisdiction in such case, holding this is not the multiplicity of suits to be avoided which

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confers equity jurisdiction. These cases decide that a court of equity will not exercise jurisdiction or grant relief upon the doctrine of preventing a multiplicity of suits, whether the suit be brought by a single tax-payer and property-owner or by one or more suing on behalf of himself and others, or by many individuals united as co-plaintiffs to restrain the enforcement of or to set aside and annul, or to be otherwise relieved from any local municipal assessment or any tax purely personal and not made a lien upon real property made by a county, town, city or district, whereby a public indebtedness is or would be enhanced, upon the ground that such assessment, tax, official proceeding or public debt was illegal, and either voidable or void. *Dodd v. Hartford*, 25 Conn. 232, 234; *Sheldon v. School District*, 25 Conn. 224, 228; *Youngblood v. School District*, 32 Mich. 406; s. c., 20 Am. Rep. 655; *Howell v. City of Buffalo*, 2 Abb. App. Dec. 412, 416; *Bouton v. Brooklyn*, 14 Barb. 375, 387, 392, 394; *Harkness v. Board of Public Works*, 1 McArth. 121, 127, 133; *Kilbourne v. St. John*, 41 N. Y. 21, 27; s. c., 17 Am. Rep. 291; *Ayres v. Lawrence*, 63 Barb. 454; *Tift v. Buffalo*, 1 T. & C. 150; *Combs v. Supervisors*, 1 T. & C. 296; *Barnes v. Beloit*, 13 Wis. 93; *Newcomb v. Horton*, 18 Wis. 566, 568, 569; *Cutting v. Gilbert*, 5 Blatch. 259, 261, 263; *Phelps v. Watertown*, 61 Barb. 121, 123.

Some of these decisions are based on the ground that it is contrary to public policy and governmental expediency to permit the awarding of such injunction. These cases were much controlled and influenced by the cases of *Doolittle v. Supervisors*, 18 N. Y. 155, and *Roosevelt v. Draper*, 23 N. Y. 318, which were based on the position that when local officers, as of a county or city, having quasi legislative and administrative functions, do some official act, which is illegal or in excess of their powers, an individual citizen, who suffers thereby only the injuries which are sustained in common by all other members of the community—that is, suffers no special injury, has no cause of action whatever. His only redress in such case is an appeal to the legislature or to the voters to elect officers who will repeal or nullify the illegal and oppressive acts complained of. But as these grounds are not taken in many of the cases cited, it is to be presumed that they were regarded as untenable, or at least questionable. The ground on which these other cases are based is that the plaintiffs in such a suit, though it be brought on behalf of themselves and of all others, do not show a case for the

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application of the rule for the prevention of a multiplicity of suits, as no one of the plaintiffs is threatened with many suits or much litigation. As this is the much more plausible reason on which to base decisions of this character, I will set out their reasoning in the language of two of the ablest of the judges who have entertained these views, in order that their full force and weight may be distinctly seen and appreciated.

In *Dodd v. City of Hartford*, 25 Conn. 232, Dodd and thirty-two others filed a bill in behalf of themselves and others against the authorities of Hartford, praying an injunction restraining the defendants from enforcing the collection of certain assessments for the expenses of constructing a sewer in said city, for the enforcement of which a warrant of distress had been issued and levied on the goods of Dodd, and like steps were threatened to be taken to enforce the tax against the others. The bill stated these facts, and for reasons stated, the assessment of this tax was claimed to be illegal and void. The bill further stated that Dodd had commenced against these authorities of Hartford City an action of trespass, and that unless they were enjoined from collecting this illegal tax, some three hundred separate actions of like character would have to be instituted, causing great expense and vexation; and the bill prayed that in order to prevent a multiplicity of suits and to determine the rights of the parties, the defendants might be enjoined from collecting this tax or assessment. The bill was demurred to and the demurrer was sustained. In pronouncing the opinion of the Supreme Court of Errors, SEYMOUR, J., says, on pages 237 and 238:

“We are of opinion that the court has no jurisdiction to interpose by way of injunction as prayed for. No property, right, or franchise held by the plaintiffs in common is claimed to be affected by the proceedings of the city. The assessments are against the plaintiffs severally, not against them jointly. If the warrants are collected and any of these parties have occasion to bring suits at law, their suits must be several and separate; they certainly cannot join in an action at law against the city or against the collector. In respect to each of these plaintiffs taking his case separately, it is difficult to see why he has not adequate remedy at law. There is no averment that the real estate of any of the parties has been or can be levied upon. The warrant authorized the taking of personal estate only. No irreparable injury can arise from the levy. If the proceedings of the common council are irregular and void,

as the plaintiffs claim they are, an action at law will lie to recover all the damages which shall be sustained by the levy, and the question of the legality of the assessment will be tried in its appropriate forum, a court of law. The claim most pressed by the plaintiffs is that the court ought to entertain jurisdiction in order to prevent the multiplicity of suits. But no one of these petitioners has any interest in the suit which another of them may be called upon to institute. They can not individually complain that others are compelled to sue, for they have no share in the expenses or vexation of each others' suits. The multiplicity of suits which the bill seeks to avoid does not affect injuriously any one of the plaintiffs. No one of them has any occasion to expect any such multiplicity affecting himself. One suit is all that any of them has to fear, and the object of this bill would seem to be to relieve these parties severally from their one suit and to consolidate the apprehended litigation. In other words, to enforce a consolidation rule, by means of the extraordinary power of a court of chancery. If the assessment were against one person only, it is not claimed that he could transfer from a court of law to a court of equity the question of his liability. But how is the condition of any one of these petitioners the worse because others are assessed for the same improvement? It would undoubtedly be convenient to try the questions relating to these warrants in one comprehensive law suit. But it does not seem to the court that the case presented by the bill is one of such irreparable injury, or of inadequate relief at law, as to warrant in taking it away from the legal tribunals. There are also reasons of policy founded on the necessity of speedy collection of taxes, which ought to prevent a court of chancery from suspending these proceedings, except upon the clearest grounds."

Though no authorities are cited to support these views, yet I have thought it proper to quote this opinion at length, because it presents in the strongest manner the reasons why an injunction should not be awarded in a case similar to the one presented by the bill in the cause before us. We will presently see however that the convenience of trying the questions which arise in such cases in one comprehensive suit are so great, that as they cannot be tried in one suit at law, a court of equity, according to the decided weight of authority, now will interpose to avoid this great multiplicity of suits, and that too despite the necessity of the speedy collection of taxes. The above case was decided in 1856. But it

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must be admitted that there are a number of courts of the highest respectability who still entertain views very like to those expressed in this opinion. Thus in *Youngblood v. Sexton*, 32 Mich. 400; s. c., 20 Am. Rep. 655, decided in 1875, it was held that the tax imposed by the liquor-tax law of Michigan, passed in 1875, being a personal tax merely, its collection could not be enjoined, even though it was illegal, the ordinary legal remedies being sufficient for such cases.

[Omitting extracts from that case.]

The grounds for refusing an injunction in a cause like the one before us are in this opinion of Judge COOLEY presented in their full force. But very few of the cases cited by Judge COOLEY give really any support to the views expressed by him. Nearly all of them simply decide, what must be regarded as well settled, that the mere illegality of a tax complained of, or its injustice or irregularity gives no right to an injunction in a court of equity, there being no grounds alleged in the bills in nearly all these cases, why a court of equity should assume jurisdiction under the head of avoiding a multiplicity of suits or under any other acknowledged head of equity jurisdiction.

These views of Judge COOLEY, though supported by many authorities of great weight other than those cited by him, are repudiated by the decided weight of authority. Pomeroy in his *Equity Jurisprudence* (see note to § 260, vol. 1, p. 278) arranges the cases when courts of equity have entertained jurisdiction and when necessary have awarded injunctions to stay the collection of illegal taxes levied by counties, cities and districts, and even States, or have entertained suits and interposed to annul proceedings, which would necessarily result in a public debt, when such proceedings by public authorities were illegal, the ground of such interposition being the avoiding of a multiplicity of suits. In some of these cases the suit was brought by a number of tax payers or by one suing on behalf of himself and all others.

In reference to these cases Pomeroy says: "It should be observed that all of this latter group of cases arose in States where the courts had already decided that a tax-suit by many tax payers joined as plaintiffs, or by one suing on behalf of the others, would be sustained on the ground of preventing a multiplicity of suits, and they regard a suit by one tax payer alone as substantially the same in its effects, and treated it in the same manner, citing the same preced-

ents indiscriminately in support of the one or the other form. Indeed in many of these latter cases the court expressly said that the suit might be brought in either form by many tax payers joining as plaintiffs, by one suing on behalf of the others, or by one suing alone. No distinction in principle was made between the three."

Upon the authority in these cases Pomeroy in his text says: "In a large number of the States the rule has been settled in well-considered and often repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by a number of tax payers joined as co-plaintiffs, or by one tax payer suing on behalf of himself and others similarly situated, or sometimes by a single tax payer suing on his own account to enjoin the enforcement and collection, and to set aside and annul any and every kind of tax or assessment laid by a county, town or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability, or whether it be made a lien on the property of each tax-payer, whenever such tax is illegal; and in like manner to set aside and annul every illegal public official action or proceeding of county, town or city authorities, whereby a debt against said county, town or city would be unlawfully enhanced, and the amount of future taxation would be unlawfully increased, as for example, unlawful proceedings of municipal authorities to advance money, or to loan the public credit to a railroad, or to bind the municipality in aid of a railroad, or to offer and pay bounties to soldiers, or to erect public buildings, and numerous other analagous proceedings which would necessarily result in a public debt and in taxation for its payment.

"In the face of every sort of objection urged against a judicial interference with the governmental and executive functions of taxation, these courts have uniformly held that the legal remedy of the individual tax payer, either by action for damages, or perhaps by *certiorari*, was wholly inadequate; and that to restrict him to such imperfect remedy would in most instances be a substantial denial of justice, which conclusion is in my opinion unquestionably true. The courts have therefore sustained these equitable suits and have granted the relief, and have uniformly placed their decisions upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits." And he adds: "The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree which

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would otherwise require an indefinite amount of separate litigation by individuals, even if it were attainable by any means. In several of the States there is a long series of these cases extending through a considerable period of time, and it may happen that in the earlier decisions of such a series the court has stated the reasons for its judgment at large and has expressly announced the principle of preventing a multiplicity of suits, as the ground of its jurisdiction, while in succeeding ones the judges have not thought it necessary to repeat the reasons and grounds which had already been fully explained."

I fully concur with Pomeroy that these cases do clearly establish the principle he has deduced from them. I also concur with him that these principles settled by these decisions are sound, and that the principles laid down by Judge COOLEY in the opinion, which I have quoted hereinbefore, are not only unsound, but are opposed to the decided weight of authority. In fact Judge COOLEY in his work on taxation in the edition of 1879, in effect admits that his views, as above expressed, are opposed to the decided weight of authority. He there says: "When the illegality extends to the whole assessment, or when it affects in the same manner a number of persons, so that the question involved can be presented without confusion by one bill filed by all or any number of those affected, there seems to be no sufficient reason why a joint bill should not be permitted. The reasons favoring it are, that it avoids the necessity of a multiplicity of suits and the attendant trouble and expenses; and the objection that the interests of the complainants are several is sufficiently met by the fact that complete justice may be done to all in one suit on the single issue; whereas if the parties did not join, the same issue must be passed upon in separate suits brought by the several complainants. Although there has been some hesitation, the weight of authority is decidedly in favor of supporting them and this mode of redress is now commonly resorted to when the case is appropriate to it." Cooley Taxation, 543, 544.

I have said I concur in the conclusion reached by Pomeroy in his Equity Jurisprudence, and that it is sustained by the numerous cases cited in the note. But an examination of these cases will show that some of them bear but slightly on the subject; that others are improperly classified; that in many of them, while a court of equity exercised jurisdiction, it was done apparently with-

out objection, and no reason is assigned for the exercise of the jurisdiction; that in many of them the court exercised jurisdiction without regard to the form in which the suits were instituted, some of them being instituted by a single tax-payer complainant, others by several tax-payers, and others by one or more tax-payers for himself or themselves and all other tax-payers having like interests; and that in most of the cases the courts paid no attention to whether the suit was brought in one form or in the other. In some of the cases however the question was raised as to the jurisdiction of a court of equity; and the jurisdiction was decided to exist, and then reasons were given for assuming it.

[Omitting a review of *Att'y-Gen. v. Heelis*, 2 Sim. & Stu. 67.]

Judge DILLON, in his work on Municipal Corporations, considers the question quite fully, and says if the ordinary principle which obtains as to public nuisances is applied, it must be admitted when the duty about to be violated by the corporation or its officers is public in its nature, and affects all inhabitants alike, that one not suffering any special injury cannot in his own name, or by uniting with others, maintain a bill to enjoin. The reason urged against it is that if one can maintain such an action an indefinite number can do the same. He says: "To allow the taxable inhabitant to maintain a bill for an injunction to prevent illegal expenditures or appropriations of money, has the advantage of directness and simplicity, and notwithstanding its departure from apparent principles, has had the quite general but not uniform approval of the courts in this country; and practically this course has not had the effect to engender a multiplicity of similar suits by separate parties, but a few persons usually unite in one suit, which when judicially settled, in effect settles the question in controversy." See section 736. And again he says: "Much more clearly can this be done when the right of the public officer of the State to sue is not admitted or does not exist." Section 736 *a*. The action is regarded in the nature of a public proceeding to test the validity of the acts sought to be impeached. In New York, and perhaps other States, the attorney-general is authorized to institute and carry on actions for such purposes.

[Omitting a review of *Board, etc., v. Markle*, 46 Ind. 104; *Newmeyer v. Mo. & Miss. R. Co.*, 52 Mo. 81; s. c., 14 Am. Rep. 394.]

This opinion (in *Newmeyer v. Railroad*) is devoted principally to answering the objections to a suit of the character of the one be-

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fore us arising from the acts complained of being public acts, in which the general public were affected and no person specially, and that therefore the suit should be brought by the attorney-general as the representative of the general public, and if this can not be done, then there was no legal remedy, but the parties injured could get redress only from the legislature or by the election of other public authorities, who would correct the wrong complained of resulting from the illegal act of public functionaries. That there was no remedy for wrongs of this character by resort to a court of equity to enjoin its commission, was held in *Roosevelt v. Draper*, 23 N. Y. 318, and in *Doolittle v. Supervisors, etc.*, 18 N. Y. 155; and the reasons for so holding are set out forcibly in those cases, but are, I think, unsound as shown by the reasoning in the two opinions in *Board of Commissioners of Clay Co. v. Markle*, 46 Ind. 96, and *Newmeyer v. Mo. & Miss. R. Co.*, 52 Mo. 81; s.c., 14 Am. Rep. 394, above cited. The other objection to suits of the character of the one before us, that the mere illegality of the tax complained of gives no right to an injunction in a court of equity, unless the case is brought within some recognized ground of equity-jurisdiction, such as the avoiding of a multiplicity of suits, and which is so plausibly presented in the opinion of Judge COOLEY in *Youngblood v. Sexton*, 32 Mich. 409; s. c., 20 Am. Rep. 655, above quoted, is not met by the reasoning in this Missouri case; but it seems to me, it is fairly met by the reasoning of Judge CHRISTIANCY in the case of *Scofield v. City of Lansing*, 17 Mich. 437, which was referred to by Judge COOLEY in his opinion.

[Omitting extracts.]

In *Murray v. Hay*, 1 Barb. Ch'y, 59, the bill was filed by two persons owning in severalty two dwelling-houses with no common interest in the property against a defendant for a nuisance which was a common injury to both, rendering the property of each less valuable. The bill was objected to as multifarious, but sustained by the court, and in *Reid v. Gifford*, 1 Hopkins, 416, the bill was held not liable to this objection, though filed by several proprietors of several lands and mills, and of several parts of a natural water-course, to restrain a nuisance caused by an artificial channel cut by a defendant on his own land, the effect of which was to draw off the water. This was held such common injury to all the complainants as to authorize them to join in one bill, though the injury sustained by each was separate and distinct.

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The principle involved in these cases is not to be distinguished from that in the case before us. While the property or pecuniary interest of the complainants were several, yet the action of the defendants of which the bill complained, and for which relief is sought, was identical as to all the complainants. So in the present case, though the interest of complainants in the real estate upon which the tax is assessed is several and distinct, yet the action of the defendants, the proceedings on their part from beginning to end, are identical as to all the complainants, and affect them all in the same manner. Their claims are entirely consistent with each other. Adams Eq. 313, * * * * each complainant must, under the present bill, make out the same case and no other, that he would have been bound to make upon a bill filed by him separately; and the same defense as to each complaint is open to the defendants as if separate bills had been brought by each.

“It is therefore difficult to see in advance how the defendants can be embarrassed in their defence by the joinder of the complainants. [And if they can offer no stronger objection to the bill than that fifty-nine separate suits should have been brought against them instead of one, the bill ought to be sustained on the ground of preventing a multiplicity of suits and a needless multiplication of costs. The substance of the complaint in the bill is the illegal imposition of the tax; and if illegal as to one, it is equally so as to the other complainants; if valid as to one, it will be valid as to all. The proceedings therefore for the imposition of the tax will in all probability constitute the principal subject of litigation, and this is the same as to all. It is true the title of each complainant may be disputed, and they may be each put to the proof. If any one of them should then fail in making out his title the bill would be dismissed as to him. If in the progress of the cause it should become evident that such embarrassment must arise in consequence of the multiplicity of issues or other complications growing out of the joinder of all these complainants, as to over balance the advantage to be derived from settling the rights of all in one suit, instead of separate suits by each, it is always competent for the court (if no mode of governance can be devised) to dismiss the bill on this account of their own motion. *Greenwood v. Churchill*, 1 M. & K. 546. But we cannot say *a priori* that such practical difficulty is likely to arise from the joinder of the complainants. In-

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deed we think such a result highly improbable. We cannot therefore sustain the objection on demurrer.”]

It is true this was a tax in this case upon lands, which was charged in the bill to be a lien on each lot of land severally for the tax upon it, and was thus alleged to be a cloud upon the title of each lot of land; and this might have given a court of equity jurisdiction of a bill filed by one of the lot-owners to remove the cloud from the title of his lot. But the fifty-nine complainants were, as the opinion shows, entertained as joint complainants, only because they had a right to file this bill to avoid a multiplicity of suits. If these fifty-nine complainants could file a joint bill to prevent fifty-nine suits either at common-law or chancery, it seems perfectly obvious that had this tax been a mere personal tax, they would have had an equal right to file such a joint bill of injunction to prevent fifty-nine separate common-law suits, which it would have been necessary to bring to recover back severally the illegal tax each one had paid, for it certainly makes no difference in giving jurisdiction to a court of equity whether the suits prevented are common-law or chancery suits. I consider therefore that the opinion applies equally to the case when the tax complained of is, as in the case before us, a personal tax, as when it is a tax on land. The portion of the opinion which I have bracketed, which contains the gist of the opinion, is as applicable to one species of illegal tax as to another; and I regard it as a satisfactory reply to Judge COOLEY’s opinion in *Youngblood v. Sexton*, 32 Mich. 406; s. c., 20 Am. Rep. 655.

The real qualifications to the right to enjoin the collection of a tax totally illegal by a joint suit in equity brought by all the taxpayers are to be found clearly laid down in *Kerr v. City of Lansing*, 17 Mich. 35.

[Omitting extracts.]

Our conclusion is that the weight of authority as well as reason justifies the interposition of a court of equity by injunction to stay the enforcement of an unconstitutional tax levied by a County Court, provided there are proper parties plaintiffs and defendants to the suit, and it is in a proper form and is not liable to objections like those pointed out in the above case. If because of the conflict of authority and the reasons, which may be urged against granting an injunction in any case, I was inclined to hesitate, which I am not, the decisions which have been rendered in Vir-

ginia and in West Virginia would turn the scale and confirm me in the conclusion which I have announced. While in these States as in others the decisions have not been uniform as to who are the proper parties plaintiff in an action of the character of the one under consideration, yet they, it seems to me, all concur that with the proper parties before the court an injunction will be awarded to prevent the collection of an illegal or unconstitutional tax by a county collector. This I regard as a legitimate inference from the Virginia and West Virginia decisions. See *Bull v. Read*, 13 Grat. 78; *Johnson v. Drummond, etc.*, and *Crockett v. Thomas*, 20 Grat. 419; *Kuhn v. Board of Education of Wellsburg*, 14 W. Va. 499; *White Sulphur Springs Co. v. Wellington Holly*, 4 W. Va. 507; *Osborn v. Stealey*, 5 W. Va. 85; *McClung v. Livesay*, 7 W. Va. 329; *Doonan v. Board of Education*, 9 W. Va. 246; *Corrothers v. Board of Education*, 16 W. Va. 527.

I will now consider who are the proper parties plaintiffs in such a suit and what is its proper form, and whether the law governing the requisite parties in such a suit has been violated in the cause now before us. It will be seen from what I have already said that when the courts of equity have permitted suits of this character to be brought they have paid very little attention to the question who were the plaintiffs in the suit. In many of these suits the plaintiff has been a single tax-payer; in other cases the plaintiffs were several tax-payers, sometimes a very large number; in other cases the plaintiff was a single tax-payer, who sued on behalf of himself and all other tax-payers similarly interested; and in other cases the plaintiffs were a number of tax-payers who sued on behalf of themselves and all other tax-payers similarly interested. In many such cases the court simply assumed jurisdiction, as though it was a matter of course; and when it discussed the question and formally decided that it had jurisdiction, it took no notice of the form of the suit as to who were the parties plaintiffs, apparently assuming as a matter of course that such suit might be brought in any of the four forms above indicated.

It is apparent therefore that such authorities will throw very little light on the question: Who are the proper parties plaintiff in such a suit? And we must principally rely on the decisions in this State to determine this question.

[Omitting this review.]

It remains now to apply the law as stated above to the case be-

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fore us. The object of the bill in this cause was to enjoin the enforcement in Grant district in Grant county a dog-tax, which the County Court of Grant county had levied on all the owners of dogs in said county under and in pursuance of chapter 23 of the acts of 1881, and to restrain said County Court of Grant county from appropriating any money which had been or might be collected from said tax on dogs, to the payment of the losses of private individuals from the destruction of sheep by dogs, and further to prohibit the sheriff of Grant county from paying out money that may come into his hands from said dog-tax for said purpose, under the provisions of said act of the legislature, the ground on which the injunction was asked being that this act was unconstitutional, null and void, and that therefore the County Court of Grant had no authority to assess the tax; and especially that sections 5 and 6 of said act, which authorized the payment by the sheriff out of the fund raised by this dog-tax to private individuals in said county for losses sustained by the destruction of their sheep severally by dogs, was unconstitutional and void.

Now, it is obvious from the law, as I have stated it, that a court of equity would have no jurisdiction to award such an injunction, merely because the tax was illegal, and the act under which the tax was assessed was unconstitutional, null and void. Nor would a court of equity have any jurisdiction to award any injunction to prohibit the appropriation of the moneys arising from this tax to the payment of losses sustained by individuals by the destruction of their sheep, merely because the act authorizing such appropriation was unconstitutional, null and void. It is equally obvious that if a bill was properly framed and the suit brought by proper plaintiffs against proper defendants, and this chapter 23 of the acts of 1881 was unconstitutional as claimed, an injunction ought to be awarded, not only to prevent the collection of the tax, but also to prevent the appropriation of the moneys arising from it to the payment of losses sustained by individuals by the destruction of sheep by dogs. Such a bill when properly framed would ask this interposition of a court of equity, not merely because the tax was illegal and this act unconstitutional, but for the additional reason that this interposition of a court of equity would avoid a multiplicity of suits, as each dog-owner and therefore tax-payer would have, unless the court of equity interposed by such an injunction, to institute a separate suit to remedy the wrong he would suffer.

Who then are the proper parties plaintiffs and defendants in such a bill? The act complained of was the assessment illegally, as was claimed, of a dog-tax on every owner of a dog in Grant county by the County Court of Grant. Every owner of a dog in Grant county who was subject to this tax alleged to be illegal was equally interested in having the action of the County Court of Grant in assessing this tax declared illegal and void and in enjoining the collection of this illegal tax. The suit therefore should, according to the principles I have laid down, have been brought by one or more owners of dogs resident in Grant county and subject to this dog-tax, on behalf of himself or themselves, and all the other owners of dogs resident in Grant county and subject to this tax. It is true that this alleged illegal tax was to be collected by the several constables in the several districts of Grant county, each constable confining his collections to the owners of dogs taxed who resided in his district; and it is also true, as I have stated, that the complainants in such a bill must have a common cause of action, one in which they together represent one entire claim or interest. The grievance complained of must be identical in all respects, and all the complainants must stand upon the same footing. But does the fact that this dog-tax was to be collected by one constable in one district in Grant county and by another constable in another district in Grant county cause the owners of dogs living in different districts in Grant county to have separate and distinct interests? Are not the grievances complained of identical in all respects, whether the complainants live in one or in several districts in Grant county? Do not all the complainants, though living in different districts, stand upon the same footing? Would it have been possible if the dog-owners subject to this tax living in Grant county in different districts had been united in one suit, to dismiss the bill as to the residents in one district and to sustain it as to residents in any other district? This is the true criterion to be applied to ascertain whether all the dog-owners subject to this tax in Grant county should have been complainants jointly.

In the case of *Kerr v. City of Lansing*, 17 Mich. 34, this was the criterion which the court applied, as appears from the opinion of the court in that case heretofore quoted. But in this case, if the suit had been brought on behalf of all dog-owners resident in Grant county, subject to this dog-tax, it would not have been possible to decide in favor of one complainant and against another.

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Their grievance was common and joint; that is, the enforcement against them severally of an illegal tax. It was to each of them a totally immaterial matter what constable had the collection of the tax. If it were a legal tax, then the constable in each several district had a right to collect, and if illegal, no one of the constables had any right to collect it. I cannot therefore see any reason why the suit could not and should not be brought on behalf of all the dog-owners in Grant county who were subject to this alleged illegal tax. And if it could be so brought, on the principles of law which I have laid down, it could be brought in no other manner. The suit should have been brought therefore by the plaintiffs for themselves and all other owners of dogs subject to the tax complained of, who were residents in Grant county instead of by the plaintiffs on behalf of themselves and all other tax-payers of Grant district in Grant county.

It is obvious, if I am right as to the proper parties plaintiffs in such a bill, that all the constables in Grant county, in whose hands were any portion of these taxes for collection, were proper and necessary parties defendants instead of merely the constables in Grant district in Grant county, as was in fact the case in the bill in the cause before us.

For these reasons I am of opinion that the bill on its face in this case was fatally defective, and the injunction prayed for ought not to have been awarded, and that the decree of April 3, 1883, must be reversed, and the bill dismissed at the costs of the plaintiffs below, and that the appellant, the county of Grant, recover of the appellees, Joseph V. Williams, George F. Cunningham and Edward Williams, its costs in this court expended.

If the bill could on the facts appearing in the record be amended it would not be dismissed; but the decree of the Circuit Court would be reversed and the cause remanded to the Circuit Court with leave to amend the bill within such reasonable time as the Circuit Court should fix. But this is not done; for though when this bill was filed, the plaintiffs, by suing on behalf of themselves and all other owners of dogs subject to this dog-tax residing in Grant county and making the proper defendants, could, it is presumed, have filed a good bill, as it is to be presumed these owners of dogs then occupied the same position and had the same interest, the tax in none of the districts having been, I presume, then collected; though it has been probably collected and appropriated be-

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fore this time, but even if the whole of the tax in all of the districts of Grant county were still uncollected, this bill could not be amended; for if a proper bill were filed now it could not be regarded as an amended bill, as it would make an entirely different case from that stated in the original; the parties both plaintiffs and defendants would be different, and also the main object of the bills, this suit being to stay the collection of this dog-tax in Grant district in Grant county only, while the main object of the other would be to stay the collection of the dog-tax throughout Grant county.

Reversed and dismissed.

NOTE BY THE REPORTER. —The latest adjudication on collection of a tax is the question of injunction against the *City of Milwaukee v. Koeffler*, 116 U. S. 219, in which it was held that a bill in equity to set aside and restrain the collection of a personal tax, or a tax levied upon personal property by a municipal corporation, cannot be maintained on the sole ground of the illegality of the tax by reason of the non-residence, within the limits of such municipality, of the person against whom the tax is levied. MILLER, J., delivering the opinion, said:

“The case of *Dows v. City of Chicago*, 11 Wall. 108, was a bill in equity in the Circuit Court of the Northern District of Illinois, brought by Dows, a citizen of New York, to restrain the city of Chicago from collecting a tax upon the shares of stock which he owned in a National bank located in that city. He alleged that the tax was illegal because his shares were assessed at a higher rate than other moneyed capital in the city; and because, not being a resident of Chicago, but of New York, his personal property belonged to his domicile, and any tax levied on it by the city of Chicago was void. The bill was dismissed on demurrer, on the ground that a court of equity had no jurisdiction to give relief for the reasons stated in the bill.

“It will be observed that in that case, as in this, the tax was resisted as a tax on the person on account of personal property, on the ground that the party assessed did not reside within the city, and the corporation therefore had no power to tax him. The property for which the tax was assessed was in each case intangible property. In the first case it was bank shares, the certificates of which were undoubtedly held at the residence of Dows in New York, and in the present case it was for money loaned on mortgages.

“Looking at the case then made by the bill, one in which the assessment of the tax was not only irregular, but void, the court, in the language of Mr. Justice FIELD, said: ‘Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon

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taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devoted of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found upon examination that the question of jurisdiction was not raised or was waived.'

"The opinion contains an examination of the adjudged cases by which the proposition is sustained, in one of which, that of *Cook Co. v. Chicago, B. & Q. R. Co.*, 85 Ill. 465, the general principle is well stated by the Supreme Court of Illinois, namely: 'That while a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed on property not subject to taxation, it had never held that jurisdiction would be taken in those excepted cases without special circumstances showing that the collection of the tax would be likely to produce irreparable injury, or cause a multiplicity of suits.'

"In the case of *Hannewinkle v. Georgetown*, 15 Wall. 547, the principle is thus stated: 'It has been the settled law of the country for a great many years that an injunction bill to restrain the collection of a tax, on the sole ground of illegality of the tax, cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity-jurisdiction. This was decided as early as the days of Chancellor KENT, in *Moore v. Smedley*, 6 Johns. Ch. 28, and has been so held from that time onward.'

"In the *State Railroad Tax* cases, 92 U. S. 575, 614, these decisions are reviewed with others, and the whole question very fully considered, as the importance of the cases and the ability of the counsel who argued them required; and after citing the language in *Dows v. Chicago* and *Hannewinkle v. Georgetown*, the court adds: 'We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of taxes; but we may say that in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisprudence and that mere errors or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of the taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.' An intimation in the opinion in that case, to the effect that in cases of taxes assessed by counties, towns or cities, a more liberal use of the control of courts

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of equity may be necessary, has been cited in their brief in the present case as affording ground for sustaining the injunction here. But no class of cases was there mentioned as justifying this interference, and it is evident that the mere facts that the tax was levied by a local corporate body, and was also illegal were not in themselves supposed to be sufficient; for the cases cited in the sentences preceding that remark, of *Dows v. Chicago* and *Hannewickle v. Georgetown*, were both cases of taxes by towns, to which the doctrine of the restricted powers of a court of equity was applied.

“The rule against the interference of a court of equity and the exceptions to the rule are restated with careful accuracy in the very recent case in this court of the *Union Pac. Ry. Co. v. Cheyenne*, 113 U. S. 525:

“As to the decisions of the Supreme Court of Wisconsin, its language in the case of *Quinney v. Town of Stockbridge*, 83 Wis. 505, is as emphatic as that of this court: ‘The complaint,’ says the court, ‘charges the seizure of certain personal property belonging to plaintiffs by the treasurer, under and by virtue of the warrant for the collection of the taxes, and asks an injunction to prevent the treasurer from selling the same. It is well settled, in this court at least, that the writ of injunction will not be granted for such a purpose, and that the illegal seizure and threat of the officer to sell the goods and chattels of the plaintiff constitute no ground for equitable interference.’ In the case of *Van Cott v. Supervisors of Milwaukee Co.*, 18 Wis. 247, which, like the present case, was a bill to enjoin the collection of a tax on personal property, and in nearly every other respect is like this, except that the county of Milwaukee was defendant there, and here it is the city, the same court gave the reasons for the rule adopted by it in the following language: ‘Our reasons in brief are that by the wrong such as is complained of here no irreparable mischief is threatened, no cloud is thrown over the title to real estate, which a court of equity may be called upon to remove, and the plaintiff has an ample remedy at law. To say nothing of the special remedies given by statute, which with diligence and attention on the part of the tax-payer will always prove effectual, and nothing of the remedies by *certiorari*, *mandamus*, prohibition, etc., as heretofore applied in such cases, it seems to us that the remedy by action against the assessors in cases where they exceed their jurisdiction, and the right which the party always has to recover back the money paid for taxes illegally imposed, if collected by distress and sale of his goods, or if upon levying a warrant he pays to save his property, constitute a complete answer to the application of a court of equity to restrain or prevent the collection.’ It is then shown that the corporation being liable in an action to recover back the tax wrongfully exacted, the return of this sum is, both in law and equity, full compensation.

“There is nothing to take the case before us out of the principle here laid down, and the decision of the highest court of Wisconsin, that the remedy at law is ample, must command our respect.

“In the latest case in Michigan, *Youngblood v. Sexton*, 83 Mich. 407; s. c., 20 Am. Rep. 655; COOLEY, J., says: ‘It was decided at an early day in this State that equity had no jurisdiction to restrain the collection of a personal tax, even conceding it to be illegal, the ordinary legal remedies being ample

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for the parties' protection;' citing *Williams v. Detroit*, 2 Mich. 560, and *Henry v. Gregory*, 29 Mich. 68. He also shows by additional citations that the same principle has been asserted in the courts of Massachusetts, New Hampshire, Connecticut, California, North Carolina, Rhode Island, Ohio, Missouri, New York and Maryland.

"In the case before us we see no reason for departing from the settled doctrine, both of this court and of the Supreme Court of Wisconsin.

"There is nothing here presented which brings the case under any of the recognized heads of equity-jurisdiction, and the mischiefs which must attend the exercise of the right to contest in the courts of equity every tax which is asserted to be illegal or unauthorized are too serious to justify any such departure."

NATIONAL EXCHANGE BANK V. BOYLEN.

(26 W. Va. 554.)

Bank — National — usury — remedy.

Where usurious interest has actually been paid to a National bank on the discount and renewal of a series of notes it may not be set off in an action by the bank on the last of them.*

ACTION on a note. The opinion states the case. The plaintiff had judgment below.

T. A. Bradford, for plaintiff in error.

John Brannon, for defendant in error

SNYDER, J. Action of debt, brought July 3, 1879, in the Circuit Court of Barbour county by the National Exchange bank of Weston against Daniel Boylen and others, upon a promissory note executed by the defendants to the plaintiff for \$1,200, dated June 19, 1878, and payable four months after date. The defendants pleaded *nil debent* and usury, and filed specifications of payments and set-off. The action was tried by the court, which on July 31, 1881, gave judgment for the plaintiff for \$1,300, the principal of said note, with interest thereon from that date until paid. The defendants saved several bills of exceptions, and to review the rulings of the court therein complained they obtained this writ of error.

* To same effect, *Peterborough Nat. Bank v. Childs* (183 Mass. 248), 43 Am. Rep. 509.

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The facts certified show that after the plaintiff read the note declared on, the defendants proved that when the note was discounted, the plaintiff charged thereon and was then paid interest thereon at the rate of ten per cent per annum for the four months from its date to its maturity; that the original debt to plaintiff was \$2,000, for which a note was made, and the plaintiff charged and the defendants paid interest thereon at the rate of ten per cent per annum for the time the note had to run; that this note was renewed from time to time, and at each renewal there was charged by and paid to the plaintiff interest at the same rate for the time the respective renewals had to run; that at one time there was paid \$700 on the principal of the debt, and this reduced it to \$1,300, the sum for which the note in suit was given; that no interest on said transactions is included in the note sued on, and it is composed wholly of a part of the principal of said original debt. These were all the facts proved.

The defenses set up by the pleas and specifications of payments and set-off sufficiently appear from the foregoing facts and they need not be further stated. The whole object of the defense was to have some usurious interest paid to the plaintiff, a National bank organized under the act of Congress of June 3, 1864, and doing business in this State, on discounting and renewing a series of notes, of which the one in suit is the last, applied in satisfaction of the principal of the debt; that is, to have the said usurious interest paid to the plaintiff applied in satisfaction of the note in suit. The claim is not for interest contracted to be paid and included in the note sued on, but for the application of what has been actually paid as interest to the discharge of the debt which still remains unpaid. The question thus presented is identically the same as that decided by the Supreme Court of the United States in *Driesbach v. National Bank*, 104 U. S. 52, in which that court held that: "Usurious interest paid a National bank on renewing a series of notes cannot, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt." In that case the court reaffirms its decision in *Barnett v. National Bank*, 98 U. S. 555, in which the same ruling was made, and the latter case in addition decides that "The act of Congress of June 3, 1864 (U. S. Rev. Stat., §§ 5197, 5198), having prescribed, that as a penalty for such taking (that is, taking usurious interest, the person paying such unlawful interest, or his legal representative, may

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in an action of debt against the bank recover back twice the amount so paid, he can resort to no other mode or form of procedure." The court in its opinion says: "The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties." 98 U. S. 29; *Farmers' National Bank v. Dearing*, 91 U. S. 29; *Stafford v. Ingersoll*, 3 Hill, 33.

These decisions made by the Supreme Court interpreting an act of Congress are direct authority and binding upon this court. National banks have been brought into existence by the National government and are regulated and controlled by that government. Their constitutionality has been sustained and as the laws of Congress passed in pursuance of the Federal Constitution are supreme, the States can exercise no control over such banks nor in any wise affect their operation, except in so far as Congress may see proper to permit. *Bank of United States v. McCulloch*, 4 Wheat. 316; *Weston v. Charleston*, 2 Pet. 466; *Ex parte McNeil*, 13 Wall. 240.

Congress having prescribed the rate of interest which a National bank may charge, and likewise the penalty for taking more than the rate allowed, the States are bound by the limitations thus prescribed, both as to the rate and the penalty. They can impose no penalty nor enforce any forfeiture beyond that fixed by Congress; nor can they apply remedies other than those given by the act declaring the forfeiture or the penalty. *Davis v. Randall*, 115 Mass. 547; *Willey v. Starbuck*, 44 Ind. 298.

The Supreme Court of Pennsylvania, in *Lucas v. Government National Bank*, 78 Penn. St. 228; s. c., 21 Am. Rep. 17, and *Overhall v. National Bank*, 82 Penn. St. 490, held that, "In an action by a National bank on negotiable paper discounted by it, the defendant may set off the amount of interest in excess of the lawful rate paid on other transactions." But after the decision of the United States Supreme Court in *Barnett v. National Bank*, *supra*, the Supreme Court of Pennsylvania overruled those and other decisions and followed the decision in *Barnett v. National Bank*; *vide* *First National Bank v. Gruber*, 87 Penn. St. 465; s. c., Browne Nat. Bank Cas., 365; *National Bank of Fayette v. Dushane*, 96 Penn. St. 340.

[Minor matters omitted.]

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The Circuit Court gave the defendants the benefit of their plea of usury by refusing to allow the plaintiff any interest on its debt from the time it became due until the date of the judgment. The plaintiff obtained judgment for the principal of its debt and nothing more, the interest having been forfeited by the express terms of the statute. U. S. Rev. St., § 5198. I am therefore of opinion that the judgment of the Circuit Court was right and must be affirmed.

Judgment affirmed.

CARTER V. CHESAPEAKE AND OHIO RAILROAD COMPANY.

(26 W. Va. 644.)

Water and water-course — boundary — mill-race.

Where one conveys to another by deed lands on both sides of a mill-race, in two separate parcels, describing each by metes and bounds, separately, and bounding on the "edge" or "lines" of the race, no part of the bed of the race passes by the grant.

THE opinion states the point.

J. H. Ferguson, for plaintiff in error.

J. W. Harris, for defendant in error.

GREEN, J. [Omitting a minor question.] The only other inquiry to be made is: Did the Circuit Court err in finding for the plaintiff and entering the judgment for her upon the evidence, which all appears in the record? This depends entirely upon whether the true boundary of the tract of land conveyed by the deed of April 4, 1872, to the Chesapeake and Ohio Railroad Company was bounded by the top of the bank of the race or gut, as claimed by the plaintiff, or extended, as claimed by the defendant, to either the low-water mark of the race, or to the center of the race. That it did not extend to the center of the race is to me clear on the face of the deed and is made still clearer by the evidence. The deed on its face conveys two tracts of land, one on the north side of this race containing twenty-five and seventy-five one-hundredths acres of land, and the other containing twenty-seven acres on the south side. The map which was made a part of this deed shows that these two tracts of

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land lay immediately opposite each other. If this tract of twenty-five and seventy-five one-hundredths acres extended to the center of the race the tract of twenty-seven acres also extended to the center of the race, and the two tracts bordered on each other and really constituted but a single tract, which, as the map shows, could readily have been laid off together and surveyed as a single tract. If the whole of the race was intended by the parties to be conveyed to the Chesapeake and Ohio Railroad Company it would be impossible to assign a reason why these two tracts, which would then have been but a single tract, were not conveyed in this deed as a single tract, thus avoiding the entirely useless setting out of the courses of the race on both sides of it. It is perfectly obvious that the parties to this deed certainly intended to leave unconveyed to the railroad company this race either to its banks on one or both sides or to the water's edge, at least in low water. In fact, if we look at the circumstances which surrounded the parties when this deed was made it would amount to an absurdity to so construe this deed as to make it convey the whole of this race to the Chesapeake and Ohio Railroad Company. The grantors owned a dam across the Greenbrier above, made to throw water into this race, and two valuable mills below the lands conveyed by this deed situated upon this race, and it was frequently necessary for him to dig out and remove the filling up of this race in order to use the mills. Under such circumstances we cannot conceive that he would convey away the mill race so long as he owned the mills. Other evidence might be referred to which shows beyond controversy that this was not his intention; but what I have said is certainly sufficient to show that he never did by this deed intend to convey to the defendant the whole of the race.

The plaintiff in error cites *Camden v. Creel*, 4 W. Va. 366, where the court say: "There can be no doubt where an individual having title to lands lying on both sides of a water-course grants the lands lying on one side thereof and bounded thereby, that the grantee gets by such grant a moiety of the land of the water-course, unless the grant clearly excludes such construction of it. *Hayes v. Bowman*, 1 Rand. 417; *Mead v. Haynes*, 3 Rand. 33; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Buckley v. Blackwell*, 10 Ohio, 508; *Hopkins v. Kent*, 9 Ohio, 13." This is unquestionably true; but this law has obviously no application to this case. The reason upon which the law is based is, that as the portion of the stream adjoin-

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ing the grantee's land is necessary for his enjoyment of the land, and as such portion of the stream is of no value to the grantor, the owner of the land on the opposite side of the stream, it must be presumed he intended by granting the land on one side of such stream to grant the portion of the stream adjoining the land conveyed to the grantee, and the law can fix no line between them except the middle of such stream. COWEN, J., in *Starr v. Child*, 20 Wend. 153, says: "Surely it would be absurd for the law to give a man to the shore or side of a fresh water river, and yet by saving the bed to the grantor make the owner of the land a trespasser every time he should slake his thirst or wash his hands in the stream." But in the case of an artificial race used by the grantor in connection with his mill below the lands granted, the absurdity would be that the law held that by granting lands on both sides of his mill-race as two separate tracks in one deed, each bounded by opposite sides of the mill-race, he granted the entire bed of the race to the grantee, and thus the grantor would become a trespasser if he undertook to clean out this mill-race, or to deepen it, though one or the other might be absolutely necessary in order that he might have any beneficial use of his mill situated on this race below. There can be no question therefore that the Chesapeake and Ohio Railroad Company did not acquire the land to the middle of this race by this deed of April 4, 1872.

The next inquiry is: Did this track of land of twenty-five and seventy-five one-hundredths acres conveyed by this deed to the defendant include the land down to the ordinary or low-water mark of this race? Thus much it is insisted was conveyed by this deed. In the first place, in construing this deed we have a right to look to the wording of the contract between the parties of date of October 21, 1871, whereby this land was sold, and which provided for the execution of this deed. This is a necessary deduction from the decision in *French v. Bankhead*, 11 Grat. 36. Indeed, independent of any authority it would seem unquestionable, as the deed was but the carrying out of the written contract between the parties. This tract according to the words of the contract is to run "to the edge of the mill-race, thence with the north line of the mill-race and river four hundred feet, etc.; and the map made a part of the deed describes a line as running to the "edge of the race" and thence by certain courses and distances which, though they do not accurately conform to the mill-race, yet do make bends corresponding in

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a general manner with the bends in the race. These courses were obviously intended to run "with the north line of the mill-race," as called for in the contract. If the facts set out in the statement of this case be taken in connection with what appears on the face of the deed, do the words, "edge of the race and running up it along its northern line," mean up the line which marked the edge of the water at ordinary or low-water mark, or did it mean commencing at the point on the top of the bank of this race, marked A on the map, and running along on the top of the bank where stakes were placed originally in running off this land to make the deed? We have been referred to a number of cases both by the counsel for the plaintiff in error and by the counsel for the defendant in error, in which upon various points of wordings in deeds, questions have been raised and decided as to whether a deed conveying land on a street or highway or on a stream, carried the boundaries of the tract to the edge of the street, highway or stream, or to the center of the street, highway or stream.

Many cases of this kind are cited in a note to *Salter v. Jonas*, 10 Vroom. 469, as reported in 16 Am Rep. 233, and a number of them are relied upon by each of the counsel of the parties in this case. But it does seem to me that these cases and others like them really throw very little light upon the question before us. But there are cases from which it may, I think, be fairly deduced, that if the calls of a deed were to the edge of the river which was not navigable, and thence with the northern line of such river, the low water of such river would be the boundary of such tract. Thus in *McCulloch's Lessee v. Alton*, 2 Ohio, 307, it was decided that when a deed calls for a corner standing on the bank of a creek, "thence down said creek with the several meanders thereof," the boundary is the water's edge at low-water mark. The court say, on page 311: "The fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms 'down the creek with the several meanders thereof.' They import the water edge at low water, which is a decided natural boundary, and must control a call for corner trees or stakes upon the bank." In *Starr v. Child*, 20 Wend. 156, the court assigns a very strong reason for this decision. Referring to this and other cases the court say: "These cases show, what it is very difficult for the human mind to resist, that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree

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or even all the stakes or trees of the land stand a slight distance from the river. The expression of an intent to run the line along the stream makes a distinct natural monument which overcomes the others. They are rather intended to indicate a point down to the *termini* of the water line."

If therefore this race was a natural unnavigable river the fact in proof, that the stake at which the courses upon it began stood forty-three feet from the low-water mark of the stream, would not prevent the low-water mark of the stream being the boundary of this tract, though other stakes had been planted in the survey along the bank of this stream, and all of them some distance from this low-water mark.

It remains now to determine whether it will be otherwise in the case before us, in which the lines are up the race on the boundary of the deed instead of lines up a natural stream, where as in this case the race is the head-race of mills of the grantor located below the land granted. It is obvious that the principal reason for running of lines not on the bank of the natural stream, as the words of the deed would seem to direct, but running them along the line of the low-water mark of the stream have no application to the case of such an artificial mill-race, as I have supposed, and as exists in this case. That is, that in the case of the natural stream the parties to the deed never could have meant to leave a narrow slip between the land granted and the river, for the obvious reason that such narrow slip could not be of any value to the grantor in the deed, while it would be very convenient to the grantee. But this reason is utterly inapplicable to the case I have supposed, or to the actual case before us. For in this latter case this narrow slip between the top of the bank of the race and the low-water mark of the race, so far from being of no value to the grantor, is of very great value to him, as he could not have the full enjoyment of the mills owned by him below unless he owned this slip of land between the low water and the top of the bank. This being the case there is no just reason why the words of the deed should be disregarded as well as the stakes set up by the parties on the top of the bank, and the land granted be extended down to the low-water mark in violation of the terms of the deed and to the injury of the grantor in the deed.

[Omitting minor considerations.]

For these reasons I am of opinion that the judgment of the Cir-

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cuit Court should be affirmed, and that the defendant in error should recover of the plaintiff in error her costs in this court expended and \$30 damages.

Judgment affirmed.

HARGREAVES V. KIMBERLY.

(26 W. Va. 787.)

Damages — prospective — nuisance.

In an action for turning surface-water on the plaintiffs' lands, *held*, that evidence of prospective damage was incompetent. (*See note, p. 128.*)

ACTION for turning surface-water on the plaintiffs' lands. The opinion shows the point.

W. P. Hubbard, for plaintiff in error.

H. M. Russell, for defendant in error.

JOHNSON, President. [Omitting other points.] But the court did err in permitting the witness, against the objection of the defendant's counsel, to answer the following question: "State, if you can, what will be the probable damage that will occur in the future from what has already been done to the run in the way of digging or changing its course?" The witness answered, defendant excepting to question and answer: "Well, it is pretty hard for me to answer the question as to the amount of damage, but I think it will be considerable, provided the water-course is left in the same condition it is, because it is washing out naturally right against the bank; and if it had been left full, up level to the road where the water used to go, of course the bank would have held up. This has took half of the lot away; but the prospect is there will be a great deal of slips there with the run." Why this evidence was offered I do not understand. The counsel for the defendant in error in his brief says: "The plaintiffs were unquestionably entitled to recover in this action the damages which were likely to occur in the future as well as those which had already occurred in the past." He cites no authority, neither does he present any argument. It seems to me that both reason and authority are against his position.

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In *Smith v. Railroad*, 23 W. Va. 453, GREEN, J., said: "Where the damage is of a permanent character and affects the value of the estate, a recovery may be had at law of the entire damages in one action; but where the extent of the wrong may be apportioned from time to time, separate actions should be brought to recover the damages sustained. He cites *Troy v. Cheshire R. Co.*, 23 N. H. 101; *Cheshire Turnpike Co. v. Stevens*, 13 N. H. 28; *Parks v. City of Boston*, 15 Pick. 198; *Blunt v. McCormick*, 3 Denio, 283; *Thayer v. Brooks*, 17 Ohio, 489; *Anonymous*, 4 Dallas, 147; *Tucker v. Newman*, 11 Ad. & L. 40.

In *Thayer v. Brooks*, 17 Ohio, 489, *supra*, the action was case for nuisance in diverting the water from the mill of the defendant in error, and the court held that the rule of damages in an action for nuisance is the injury actually sustained at the commencement of the suit.

In *Blunt v. McCormick*, *supra*, the court said: "The rule of damages laid down by the court was erroneous. In this action the plaintiff could only recover for injuries actually sustained before suit was brought, and not for supposed prospective damages. Supposing the lease to contain a covenant not to obstruct the light, and the action to have been brought on such covenant, the rule of damages would be otherwise, for the covenant being a single cause of action, one recovery on it would be an absolute bar to any future action. But a recovery in an action on the case for obstructing the light prior to the time when the action was commenced would not bar a future suit for the continuance of the same injury.

In *Cheshire Turnpike v. Stevens*, 13 N. H., *supra*, it was held that where an action on the case was brought to recover damages for laying out a highway around a turnpike gate, so as to divert the travel from the turnpike, and damages were recovered for the loss of toll occasioned by the opening of the highway to the date of the plaintiff's suit, subsequent suits might be maintained for further damage accruing, from time to time, as long as the highway was kept open. A recovery had been had before for dividing the tolls, and it was insisted that no action could be maintained for continuance of the road after recovery had been once had for the opening of the way. But UPHAM, J., for the court, said: "This is erroneous. The cause of action remains so long as the cause of the injury is upheld by the defendant. It has been in the defendant's power at any time to discontinue the grievance complained

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of, and so long as this power remains it would be unjust to visit him with damages except during the actual time the damage has been sustained. The injury is not necessarily permanent in its character, and recovery therefor can only be had for the past, as it may cease at any moment. The injury is of the same character as that arising from a nuisance, and is subject to the same rule of law."

It seems to me that in all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it might inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues. Here the cause may be removed, and it is supposed will be by the defendant, rather than submit to having the entire damages recovered against him for a permanent injury, or to suffer repeated recoveries as long as the cause of the injury continues. The court erred in admitting this evidence, and for this reason the judgment will have to be reversed.

The judgment of the Circuit Court of Ohio county is reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed and remanded.

NOTE BY THE REPORTER.—The most careful review ever made of this doctrine was by the New York Court of Appeals, in *Uline v. N. Y. Cent., etc., R. Co.*, January, 1886. EARL, J., delivered the prevailing opinion (DANFORTH, J., dissenting). The case was of a railroad crossing a street, and raising the grade in front of the plaintiff's land. We subjoin some extracts:

"He claims that the interference by the defendant with the street was unlawful and a nuisance, and that therefore the plaintiff was entitled to recover damages caused thereby; and if he is right in his contention that this embankment placed in the street by the defendant was unlawful, and therefore a nuisance, then the plaintiff was entitled to recover damages. The question however still remains, what damages? Are her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied and which ought to be well known and thoroughly settled. There never has been in this State be-

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fore this case the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere. In *Hambleton v. Veere*, 2 Saund. 170, the learned annotator in his note says: 'So in trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of.' In *Rosenwell v. Prior*, 2 Salk. 459, the plaintiff being seised of an ancient house and lights, defendant erected a building whereby plaintiff's lights were estopped. There was a former recovery for the erection and the second action was for the continuance of the erection. And it was held that the former recovery was not a bar.

"In *Bowyer v. Cook*, 4 C. B. 236, there had been an action of trespass for placing stumps and stakes on plaintiff's land, and the defendant paid into court in that action forty shillings, which the plaintiff took in satisfaction of that trespass. The plaintiff afterward gave the defendant notice that unless he removed the stumps and stakes, further action would be brought against him; and in the second action it was held that the leaving the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to recover. In *Holmes v. Wilson*, 10 A. & E. 508, the action was trespass against a turnpike company for continuing buttresses on plaintiff's land to support its road. Plaintiff had recovered compensation for the erection of the buttresses in a former action, and the money had been paid in to court and received by him; and it was held that after notice to defendant to remove the buttresses, and a refusal to do so, plaintiff might bring another action of trespass against the company for keeping and continuing the buttresses on the land, and that the former recovery was not a bar to such an action. In that case it was argued for the defendant that the damages given in the first action were to be regarded as a full compensation for all injuries occasioned by the buttresses, and were to be considered as the full estimated value of the land permanently occupied by the buttresses; that the damages were in respect of prospective as well as past injury, and that the judgment operated as a purchase of the land. PATTERSON, J., said, in reply to the argument: 'How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for nuisance to land will not prevent another action for continuing it.' And it was argued by learned counsel for the plaintiff in reply to the argument that the former judgment operated as a purchase of the land: 'As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be that a person who wants his neighbor's land might always buy it against his will, paying only such purchase-money as a jury might assess for damages up to the time of the action. If the property was changed when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by defendant's buttresses, would the recovery of damages in trespass be a defense? There is no case to show that when land is vested in a party and fresh injuries are done upon it fresh actions will not lie.' See also, *Thompson v. Gibson*, 7 M. & W. 456; *Mitchell v. Darley Main*

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Colliery Co., 14 Q. B. D. 125; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765. I find no case in England, now regarded as authority, in conflict with these cases. The case of *Beckett v. Midland R. R. Co.*, L. R., 8 C. P. 82, does not lay down a different rule. That case arose under the railroad clauses consolidation act, which require full compensation to be made by railroad companies, not only for lands taken, but also for damages to land injuriously affected. Under those acts the plaintiffs recovered not only the value of his lands taken, but for permanent injury to his other lands. The case of *Lamb v. Walker*, 8 Q. B. Div. 389, was overruled in *Mitchell v. Darley Main Colliery Co.*, *supra*, and is no longer authority in England.

“ The same rule of damages which I am trying to enforce prevails generally and with very rare exceptions in the other States in this Union. In *Esty v. Baker*, 48 Me. 495, APPLETON, J., said: “ The mere continuance of a building upon another’s land, even after the recovery of damages for its erection, is a trespass for which an action will lie.’ In *Russell v. Brown*, 63 Me. 208, the action was trespass *quare clausum* for continuing upon the plaintiff’s land the wall of a building nine inches wide and one hundred and six feet long. The defendant pleaded in bar a former judgment recovered for building the wall and satisfaction, and it was held that the mere continuance of a structure tortiously erected upon another’s land, even after recovery and satisfaction of a judgment for its wrongful erection, is a trespass for which another action of trespass *quare clausum* will lie, and that a recovery with satisfaction for erecting a structure does not operate as a purchase of the right to continue such erection. In *C. & O. Canal Co v. Hitchings*, 65 Me. 140, the action was trespass for filling about two hundred yards of canal, and the justice instructed the jury *inter alia*: ‘ Whatever diminution there is in the value of the property by reason of the trespass is an element of damage.’ The defendant excepted to this instruction and it was held erroneous; that the recovery should have been limited to such damages as were sustained down to the commencement of the action. WALTON, J., writing the opinion, said: ‘ It is now perfectly well settled that one who creates a nuisance upon another’s land is under a legal obligation to remove it, and successive actions may be maintained until he is compelled to do so.’ ‘ The doctrine of all the cases is that a recovery of damages for the erection of a building or another structure upon another’s land does not operate as a purchase of the right to have it remain there; and that successive actions may be brought for its continuance until the wrong-doer is compelled to remove it.’ As a necessary result of this doctrine it has been held, and we think correctly, that in the first action brought for such a trespass the plaintiff can recover such damages only as he had sustained at the time when the suit was commenced. Because for any damages afterward sustained a new action may be maintained; and the law will not allow two recoveries for the same injury.’ ‘ The injury complained of was the filling up of the canal. The defendant, acting under authority from the city of Portland, had extended Commercial street over and across the canal by means of a solid embankment. No opening was left for the passage of either boats or water. Assuming that this embankment was unlawfully placed there — that the canal should have been bridged, not filled up — and we have a nuisance upon . . .

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plaintiff's land — something placed there which can, and in contemplation of law ought to be removed. For such an injury successive actions may be maintained until a removal is compelled. The damages must therefore be limited to such as the plaintiff has sustained at the date of the writ. The rule given to the jury, namely, that the measure of damages was the diminution of the value of the property was inappropriate and must have led to an erroneous result. In *Bare v. Hoffman*, 79 Penn St. 71; s. c., 21 Am. Rep. 42, the plaintiff had a dam from which he conducted water to his tannery, and the defendant made a dam below into which the surplus water over plaintiff's dam flowed, and from his dam the defendant by a pipe conducted the water to his tannery, by which the plaintiff lost the use of the water required to carry the offal from his tannery, and it was held that evidence of permanent injury to the market value of plaintiff's tannery was inadmissible; that the injury was not of such a character as to assume that it would be permanent and to assess damages accordingly, and that as a general rule successive actions may be brought so long as the obstruction is continued. MERCUR, J., writing the opinion, said: 'The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action established the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction.'

"In *Thompson v. Canal Co.*, 17 N. J. Law, 480, it was held that the title to lands does not pass by a verdict for the plaintiff in an action of trespass, that it remains in the plaintiff, and therefore a verdict for damages to the full value of the land is manifestly wrong. In *Thayer v. Brooks*, 17 Ohio, 489, the action was case, for nuisance in diverting water from the mill of the plaintiff. The injury complained of in the declaration was that the mill was rendered less useful by reason of diversion of a portion of the water from the stream by means of a canal cut by defendant. The court instructed the jury that the owner of the mill was entitled to recover such damages as the jury believed he had sustained by the mill-site having been diminished in value in consequence of the diversion of the water. BIRCHARD, C. J., writing the opinion, said: 'This was going too far. Suppose the party liable at all, he was only liable under any form of declaration for the damages actually sustained prior to the commencement of the suit.' In *Railroad Co. v. Kernodle*, 54 Ind. 814, it was held that where a railroad company in the construction of its road-bed, without taking the steps prescribed by law to condemn its right of way, unlawfully enters upon and takes possession of land, and suit is brought by the owner thereof to recover damages for such trespass, the damages asserted should include compensation for the injury inflicted and such punitive damages as are authorized by law, but not the value of the land so used or appropriated; that in such an action no judgment that the court trying such cause is authorized to render will give the railroad company a title to the land appropriated.

"In *Harrington v. Railroad Co.*, 17 Minn. 215, where the defendant had built its road in the street adjoining plaintiff's land, it was held that it was a continuing nuisance for which successive actions could be brought, and an equitable action for an injunction was sustained for the reason that it would obviate the necessity of a multiplicity of suits. In *Adams v. Railroad Co.*, 18

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Minn. 260, the plaintiff was the owner and in possession of a lot situated on the side of the street, which also extended to the center of the street, subject only to a public easement to use the same for street purposes. The defendant, a railroad company, without first acquiring the right to do so, constructed its road along the street in front of plaintiff's premises; and it was held that the defendant in thus appropriating the street to its own use was a trespasser, and that its acts constituted a private nuisance as against the plaintiff, entitling him to maintain an action therefor, and that the damages would be for the unlawful withholding of the possession of the premises up to the commencement of the action. RIPLEY, C. J., writing the opinion, said: 'As there is no presumption of law that such illegal running of trains and other trespasses will be continued in the future—that the unlawful act of to-day will be repeated on the morrow — it is of course obvious that while the jury in the present case, could assess past damages, they could not assess the permanent damages to accrue from an assumed continued use thereafter of the land by the defendant in the same way.' In *Ford v. Railroad Co.*, 14 Wis. 609, the owner of lots abutting on a street in a city brought an action against a railroad company to recover damages caused by the construction of its road-bed through the street in front of his lots, and for an injunction restraining the defendant from laying down its rails in front of its property. DIXON, C. J., in writing the opinion, said: 'It seems that the past damages, or those occasioned by the trespass, might have been assessed by the court, or the judge might have ordered a jury for that purpose; but the permanent damages, or those which would accrue to the plaintiff by the continued use of the land by the company, can only be ascertained in the manner prescribed by the statute.'

" In *Carl v. Railroad Co.*, 46 Wis. 625, the complaint alleged that the plaintiff owned in 1869 and continued to own until 1873, a city lot with a dwelling-house thereon; that in 1869 defendant constructed its road, with embankment and ditches along and on each side of the center of the street in front of the lot, and maintained the same to the commencement of the action, and thereby obstructed access to the house and lot, and diminished their value; that by reason of the premises plaintiff, before the commencement of the action, was compelled to sell and did sell his property for a sum less, by \$1,000, than could otherwise have been procured for it, and that defendant had refused, on demand, to make compensation for the injuries so sustained, and had taken no steps under its charter to have the damages ascertained; and judgment was asked for the sum of \$1,000; and it was held that the action must be treated as one for damages for a continuing trespass, and that the complaint stated facts sufficient to sustain such an action; that the plaintiff in such an action however can recover nothing more than the damages to the property resulting from the trespass between the building of the road and the commencement of the action; that such a recovery would be no bar to a future recovery by plaintiff or his grantee for subsequent damages to the property by a continued maintenance of the road; and that evidence of the permanent depreciation in the value of the land resulting from such road was inadmissible. The judge writing the opinion said: 'The recovery in the present action will be a bar only as to damages sustained previous to the commencement of the same, and

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the plaintiff or her grantee can recover in another action for any injury caused to the lot by the maintenance of such railroad subsequent to the commencement of this action.' In *Blesch v. Railroad Co.*, 48 Wis. 188, it was held that the rule of damages in such a case as that is the difference in value of the use of the lot without the railroad track and with the railroad track, between the date of building the same and the commencement of the action. Justice COLLE, in delivering the opinion, said: 'The damages recoverable in the action are of course for the past injury to the freehold and possession; that is, the pecuniary loss which the trespass had caused the plaintiff in the use and enjoyment of his property when the suit was commenced.' And further, 'One reason why a railroad company can be charged with the permanent damages for taking land for its use only in a proceeding under the statute for asserting the right of eminent domain is, that when such damages are paid, the company is entitled to have a clear title to the property so taken, and such title cannot be acquired in an action for a trespass or nuisance. Another reason is that in the action to recover damages for the nuisance the plaintiff may have judgment to abate the nuisance, and it would be clearly unjust that the plaintiff should recover damages for a continuance of the nuisance and at the same time have judgment to abate and remove the same.' See also *Canal Co. v. Bourquin*, 51 Ga. 879.

"In harmony with these authorities are the views of approved text-writers. 3 Bl. Com 220; Sedg. Dam. 155; Mayne Dam., 1st Am. ed., §§ 110, 111; 1 Sutherl. Dam. 199, 202; 1 Sutherl. Dam. 869, 899. While the authorities in other States are not entirely harmonious, those which I have cited give the general drift of the decisions. But whatever difference there may be in other States as to the rule of damages under consideration, in this State there is none whatever. Here the authorities are entirely uniform that in such an action as this damages can be recovered only up to the commencement of the action, and that the remedy of the plaintiff is by successive actions for his damages until the nuisance shall be abated. The law was so announced in *Greene v. N. Y. C. & H. R. R. Co.*, 65 How. Pr. 154; *Taylor v. Met. Elev. Ry. Co.*, 50 N. Y. Super. Ct. 812; *Duryea v. Mayor*, 26 Hun, 120—all cases entirely analogous to this. In *McKeon v. See*, 4 Robt. 449, it was held that the only damages which the plaintiff is entitled to recover in an action against an adjoining owner for a nuisance upon the premises of the latter are those for a depreciation of the rent and loss of tenants caused by such nuisance previous to the commencement of the action. In *Whitmore v. Bischoff*, 5 Hun, 176, it was held that the damages which a party can recover for a private nuisance are those which he has sustained previous to the bringing of the action, and that it is error to allow a recovery for the diminution in value of the premises based upon the assumption that the nuisance is to continue forever. In *Duryea v. Mayor*, 26 Hun, 120, the action was brought to recover the damages occasioned by the wrongful act of one who had discharged water and sewage upon the land of another, and it was held that no recovery could be had for damages occasioned by discharge of water and sewage upon the land after the commencement of the action. In *Blunt v. McCormick*, 3 Denio, 288, the action was case for damages in consequence of the erection of a building adjoining

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plaintiff's, whereby plaintiff's light was obstructed. The plaintiff was defendant's tenant. The court at the trial charged the jury that if the plaintiff was entitled to recover they should give damages for the injury which he would suffer during the whole of his term. It was held that this charge was erroneous, and that a recovery could be had only for such damages as had occurred at the time the suit was commenced, and not for the whole term. In *Plate v. N. Y. C. R. Co.*, 87 N. Y. 473, the action was brought to recover damages caused by keeping and maintaining the defendant's railroad track and ditches along the side thereof in such manner as to cause the water to flow back upon the plaintiff's land. There had been a former recovery of damages for the same cause, which was alleged as a bar to the second action; but it was held not to be a bar. The judge writing the opinion said: 'If indeed he could have recovered damages, not only for all injuries which had occurred previous to the commencement of the action, but also for all injuries which may possibly thereafter occur, the first recovery would be a bar to the second.'

"In *Williams v. Railroad Co.* and *Story v. Railroad Co.*, a resort to equity was allowed, because the necessity of bringing successive actions to recover damages would thus be obviated. If in those cases the plaintiff could have recovered all their damages, past and prospective, in actions at law, equitable actions would have been unnecessary and unauthorized. The case of *Mahon v. N. Y. Cent. R. Co.*, 24 N. Y. 658, is a precise authority, and if there were no other, ought to control the decision of this case. In that case the railroad company constructed its road and laid its tracks upon a highway in front of Mahon's premises. His title to the adjoining premises extended to the center of the street, and in 1842 he commenced an action against the railroad company to recover damages in consequence of the construction and operation of the railroad in the highway in front of his premises, and he recovered a judgment. Afterward he died, and then his executors instituted an action to recover damages sustained during the life-time of the testator, subsequently to the former recovery, for a continuance of the railroad and its continued operation in the street; and to the last action the defendant interposed as a defense the former recovery, and it was held not to be a bar. As disclosed by the printed papers to be found in the State library, the declaration in the first action contains four counts. In the first and fourth, among other things, it was alleged that the plaintiff lawfully owned and possessed a lot and dwelling-house thereon, and that the defendant caused to be wrongfully constructed an embankment of earth of the height of five feet in front of his premises, and wrongfully continued and maintained the same and operated its railroad thereon, by means whereof he could not have and enjoy his full and unobstructed passage into and upon his lands and to and from his dwelling-house, and his lot and dwelling-house were flooded with water and rendered damp, and his buildings and property were greatly injured and depreciated in value. It is thus seen that the character of the injuries complained of in that action were like those complained of here, and that a depreciation in the value of the property was claimed. If the complaint here is broad enough to recover for permanent diminution of the value of the property upon the theory that the nuisance was to be permanent, so the declaration there was broad enough to

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recover damages upon the same theory, and if the facts of this case are sufficient to justify and uphold a recovery for permanent injury and diminution in value of the property so clearly were the facts of that case. In the argument before this court of the second case which is above cited it was claimed that the declaration in the first suit was broad enough to embrace the damages which Mahon's property sustained by the construction of the railroad through all time, and that whether it was or not, the result should be the same, as the damages resulting from the construction of the railroad were incapable of being split up and made the subject of an infinite number of actions; and that the true rule in such a case was that the plaintiff was at liberty to prove, and the jury were bound to consider what damages might probably be the result of the act complained of, and the finding in one case must embrace all the damages. On the other hand it was claimed that the plaintiff in that suit could have recovered damages legally only up to the commencement of the suit.

"The court at the trial of the second action held that the former recovery was a bar, and upon that ground nonsuited the plaintiff. They then appealed to the General Term, where the prevailing opinion for affirmance was written by Judge ALLEN. He held that the former recovery was a bar, but stated in his opinion that 'if the wrong complained of had been a technical nuisance, in the legal sense of the term, a recovery for damages for the erection would not bar an action for the continuance;' that 'every day's continuance would be a legal wrong for which an action would lie;' 'that a right cannot exist to continue a nuisance, and every party affected by it may insist upon its removal, and the neglect to comply with the duty resting upon a party to abate a nuisance which he has either erected or maintains, gives an action to any party injured by the neglect.' But he held that the railroad was not to be treated as a nuisance, and that the company had permanently appropriated the highway to its use, and therefore permanent damages could be recovered; and his opinion, if sound, would uphold this recovery. Judge PRATT wrote a dissenting opinion, taking an opposite view. In his opinion he said: 'If the injury complained of was of that nature that he was entitled to recover prospective damages, he should have proved them in that suit. The law will not suffer a party to unnecessarily split up demands and thus needlessly multiply suits;' and further: 'The track and embankment would under such circumstances be a continuing nuisance, and the defendants would be liable to a new action every day so long as they kept it up, and damages would accrue to the owner. A person by erecting a nuisance on the lands of another, or by trespassing on such lands, acquires no right thereby, and a recovery of damages for the injuries sustained does not have the effect to vest the title in the wrong-doer, as in the case of a conversion of personal property,' and here the judgment was unanimously reversed.

"CLERKE, J., in writing the opinion, commenced by saying: 'If the plaintiff's testator could have recovered all that he was entitled to in the first action it is of course a bar to the second; and this depends chiefly, though not altogether, upon the question whether the Utica and Schenectady Railroad Company in any way transcended the authority constitutionally vested in them by

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the legislature. If they did their road is a nuisance—a perpetual nuisance, and every day's continuance of it is a legal wrong for which they are liable in damages after they have accrued.' And he held that the railroad company did transcend its authority by entering upon the highway without first causing Mahon's damages to be assessed and paid; and that the illegal appropriation of the highway made it liable to damages in successive actions as the damages accrued. And he further said: 'The railroad company therefore having, without compensation to those entitled to the reversion of the lands, constructed, maintained and operated their road upon the highway in question; acted and continued to act unlawfully, are liable to damages from time to time as they accrued, and on this ground the second action is maintainable.' In the course of the opinion this language is used: 'If they did not transcend their authority, and yet in constructing their road have necessarily injured the rights of others, they are equally liable to respond for prospective as well as accrued damages; and in such case they cannot be vexed again in a second action.' It is not apparent precisely what was meant by this phrase. It is a mere *dictum*, and certainly announces an erroneous rule of law. It may be that the learned judge was misled by the doctrine apparently laid down in *Fletcher v. Auburn & Syracuse R. Co.*, *supra*. The same judge in *Plate v. N. Y. Cent. R. Co.*, *supra*, speaking of that paragraph, says: 'I am inclined to think there is some clerical or typographical mistake here, or perhaps there was some inadvertence on my part in the haste of writing,' and that it can 'at most be considered nothing more than a *dictum*, and therefore cannot control the present case.'

"There is no authority to be found in this State holding any other rule of damages in such a case. The case of *Henderson v. N. Y. Cent. R. Co.*, 78 N. Y. 423, is not in conflict, as that was an equitable action; and in the opinion written in that case the rule is recognized to be otherwise in actions at law; and the case of *Mahon v. N. Y. Cent. R. Co.* is expressly recognized, and it was certainly not intended to overrule or depart from it, or any of the prior authorities. The judgment there was based entirely upon equitable principles, and then it was ordered that upon payment of the sum awarded by the referee the plaintiff should convey the title to the defendant. If the case of *Mahon v. R. Co.*, supported as it is by abundant authority and based upon common-law principles, which in this State have always been recognized, is to be disregarded in the decision of this case, it had better be distinctly overruled, and no longer left to lure the legal wayfarer by its false light. See also, *Schell v. Plumb*, 55 N. Y. 592, 598.

"The rule contended for by the plaintiff and affirmed by the Supreme Court in this case would lead to some embarrassments and to great inconvenience. The plaintiff's recovery cannot divest her of any legal rights she has in the street, either to an easement or to the soil; and if we may assume that her recovery would bar any future recovery for the precise embankment and the precise use thereof which existed at the time of the commencement of her action, yet it would not bar a recovery if there should be a change in the embankment or the use thereof. If the defendant should run a few more trains of cars, or raise its embankment, or widen it, or change it in any way, the plaintiff would

be permitted to institute a new action, and to repeat her action every time there should be any change. And yet she has recovered damages in this action upon substantially the same theory that damages would have been awarded if there had been an appraisement under the statute which vested title in the defendant. If the rule affirmed be the correct one, then a railroad company, authorized to construct its road, may enter upon the lands of any private person and take them, and in a suit for trespass the plaintiff must recover his entire damages, and the railroad company must become substantially vested with the title to the land; and thus instead of conforming to the statute it may acquire land by a pure trespass. And so the owner of the land, instead of resorting to the constitutional tribunal for the appraisement of his damages may have them appraised by an action which really vests no perfect title. Can the statute of frauds be subverted and a perpetual easement or right in land without a grant be thus conveyed by mere estoppel? In this case has happened what may happen in many cases; the defendant supposed, and had the right in good faith to suppose, that it had satisfied plaintiff's damages and acquired all her property interest in the street until the verdict of the jury undeceived it, and then if the verdict shall stand it became obliged to pay her for perpetual damages, although they had come to an end, and to make the same compensation which it would have been required to make if it had acquired a perfect title under the statute, and yet it is left without a perfect title, liable to successive suits on the claim to be established on the uncertain evidence of witnesses that its burdens upon or interference with the street had been changed or increased. It was not left the option either to abate the alleged nuisance or to perfect its title in the mode prescribed by law to any easement or interest the plaintiff might have in the street.

“The law will not proceed upon the assumption that a nuisance or illegal conduct will continue forever. The impolicy and absurdity of such an assumption is illustrated in this case as the defendant offered to prove, and hence it may be taken as true that since the commencement of the action it has reduced the street to its former grade. The rule laid down in the cases which I have cited, and which I contend is the true one, gives any party who has suffered any legal damages by the construction or operation of a railroad ample remedy. He may sue and recover his damages as often as he chooses, once a year, or once in six years, and have successive recoveries for damages. He may enjoin the operation of the railroad and compel the abatement of the nuisance by an action in equity; and where his premises have been exclusively appropriated, or where a highway in the soil of which he has title has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment. *Brown v. Galley*, Hill & Denio, Sup. 880; *Etz v. Daily*, 20 Barb. 82; *Redfield v. Utica, etc., R. Co.*, 25 Barb. 54. It certainly cannot be necessary to subvert the law, as it has been well established, in order to give the plaintiff ample remedy for any wrong which the defendant has done or can do her in the street in front of her premises. Nor can it be expedient to introduce into the nomenclature of the law a new action—one to recover for the conversion of real property to be followed by the same consequences as an action for the conversion of personal property.

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“As to this rule of damages it matters not what the form of complaint in the first action was. The plaintiff is bound to recover in his first action all the damages to which he is entitled. If he is entitled to damages for permanent injury to his property, it is not optional for him to split them up and recover part of them in the first action and then bring subsequent actions for the rest. If entitled to recover damages only up to the commencement of his action, no form of complaint will entitle him to recover more. In the case of *Mahon v. Railroad Company*, it was proved that the former recovery was for damages only to the commencement of the former action, and yet that circumstance was not deemed material.”

“Since writing the above the case of *City of North Vernon v. Voegler*, 2 N. E. Rep'r, 821, containing a very elaborate opinion, has come to our attention. I have carefully examined that case, and find that it is not authority for the plaintiff on the question now under discussion. There the city had the right to grade one of its streets, but did it so negligently as to cause damage to the adjoining lots of the plaintiff, and it was held that he could recover, and was bound to recover all his damages in a single action. It was decided that in the absence of negligence there would have been no liability for consequential damages caused by what was rightfully done in the street. The judge writing the opinion said: ‘Our decisions have long and steadily maintained that municipal corporations are not responsible for consequential injuries resulting from the grading of streets where the work is done in a careful and skillful manner; but they have quite as steadily maintained that where the work is done in a negligent and unskillful manner the corporation is liable for injuries resulting to adjacent property.’ Here there was no allegation or proof or claims of negligence or unskillfulness in the construction of the embankment in the street, and as I have shown, it was assumed and conceded upon the trial that it was lawfully and legally constructed. The trial judge did not submit to the jury any question of negligence, but charged them if they found against the defendant as to the release, then it was absolutely liable for plaintiff's damages, and that the only question for their consideration was the amount of the damages. Hence that case is an authority for the views I have expressed upon the first ground of error herein discussed.

“But the case is also inferentially authority for the second ground of error upon which I have based my conclusion. The judge writing the opinion there is very careful to place his decision upon the ground that the structure in the street was rightful, but negligently made, and he recognized the rule as to successive actions to be different where the structure is wrongfully in the street and is there a nuisance. He said: ‘This is not the case of a nuisance. It is the case of a negligent improvement in a street. The improvement was in itself rightful and legal, but the manner in which the improvement was made was wrongful. The wrong was not in grading the street, but in the manner of doing it. It is not a nuisance for a municipal corporation to grade its streets, but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be tort to do the authorized act in a negligent manner. It.

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is evident therefore that the cases which hold that the continuance of a nuisance will supply ground for an action have no influence upon this case,' and hence those cases were not cited. It is clearly to be inferred that if that court had been dealing with the case of an unlawful embankment placed in the street it would have held that successive actions could be maintained. But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue?

"A municipality or a railroad corporation under proper authority may erect an embankment in a street, and if the work be carefully and skillfully done it cannot be made liable for the consequential damages to adjacent property. But if it be carelessly and unskillfully done it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment, and this it may do after its carelessness and unskillfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before—it may be many years before—they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrong-doer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this State and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated. But whether that case was properly decided or not, it is not in conflict with the conclusions I have reached in this case, but in entire harmony with them."

The dissent of DANFORTH, J., was based on the authority of the *Henderson* case, 78 N. Y. 423. But that was a case of the assessment of damages for a railroad right of way, which rests on a distinguishable principle.

The like doctrine is held in *Van Hoozier v. Hannibal, etc., R. Co.*, 70 Mo. 145.

See *Kans. Pac. Ry. Co. v. Muhlman*, 17 Kans. 224; *Powers v. Council Bluffs*, 45 Iowa, 652; s. c., 24 Am. Rep. 792.

In *City of North Vernon v. Voegler*, 103 Ind. 814, referred to in the foregoing opinion by EARL, J., it was held that in an action for injury to real estate by the negligence of corporate officers in grading a street all damages past and prospective must be recovered in one action. The court said:

"The answer presents a question of great importance and much difficulty. The theory of the appellee, as we infer from the record is, that the former action embraced only such damages to the real estate as occurred prior to the recovery of the judgment in that action. The theory of the appellant is that the

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former action embraced all damages resulting to the appellee's property from the negligent improvement of the street, and that a second action cannot be maintained for the same breach of duty that formed the basis of the first action.

“There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word ‘injury’ denotes the illegal act, the term ‘damages’ means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognized a difference between the things described, for it is often declared that no action will lie, because the act is *damnum absque injuria*. Broom Legal Max. 195; Weeks *Damnum Absque Injuria*, 7; Broom Com. (4th ed.) 75, 621.

“In every valid cause of action two elements must be present—the injury and the damages. The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery. Mayne Dam. 1; 1 Suth. Dam. 8. As there may be damages without an injury, so there may be an injury without damages. It has many times been said that no action will lie because the injury produced no damages, or as the law phrase runs, the wrong is *injuria sine damno*.

“The distinction between injury and damages is an important one in this instance, and for this reason we have been careful to mark the difference and to enforce our statement by reference to authorities, although the principle involved is a rudimentary one. The distinction is important, for the reason that the law is that fresh damage, without a fresh injury, will not authorize a second or subsequent action. The rule is thus tersely stated in *Warner v. Bacon*, 8 Gray, 897; s. c., 69 Am. Dec. 258. ‘A fresh action cannot be brought unless there be both a new unlawful act and fresh damage.’ This rule is illustrated by many cases. Mr. Mayne refers to the case of *Howell v. Young*, 5 B. & C. 259, and commenting on it says: ‘The statute of limitations runs from the act of negligence, not from the time that an injury accrues; such injury is merely consequential damage, not a fresh cause of action; the damages then in the original action must cover all the loss that can ever arise, because no such loss can afterward be compensated.’ Mayne Dam. 611. An American author says: ‘A cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff by the common law, and he must demand all the damages which he has suffered or ever will suffer from the injury, grievance or cause of action upon which his action is founded. He can not split a cause of action and bring successive suits for parts, because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered.’ 1 Suth. Dam. 175.

“The rule we are discussing applies to cases of personal injuries, for among the earliest of the reported cases we find it laid down for law that in an action for trespass to the person the recovery of damages must be once for all, including past as well as prospective damages. *Petter v. Beale*, 1 Salk. 11; s. c., 1 Ld. Raym. 889.

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"In *Hodsoll v. Stallebrass*, 11 Ad. & E. 801, it was held that both injury and damage must concur to give a cause of action; that the damages were not the sole cause of action, and the jury were directed to assess both present and prospective damages, because a second action could not be brought for damages resulting from the same injury. Upon this ancient doctrine rest the cases which hold that where personal injuries are received from the negligent act of a carrier of passengers, or are caused by the negligence of a municipal corporation, all the damages, present and prospective, must be assessed in one action, because a second action cannot be brought. *Town of Elkhart v. Ritter*, 66 Ind. 136; *Weisenberg v. City of Appleton*, 26 Wis. 56; s. c., 7 Am. Rep. 39; *Whitney v. Clarendon*, 18 Vt. 252; s. c., 46 Am. Dec. 150; 1 Suth. Dam. 197, auth. n. p. 198.

"Mr. Mayne, in discussing this general subject says: 'Similar questions often arise in cases where a person by digging, mining, building or the like, affects the plaintiff's land or house in such a manner as to produce injurious consequences which manifest themselves at a later period. Here it is now settled that all subsequent or recurring damage may be assessed, and can only be recovered in a suit brought upon the original cause of action.' Mayne Dam. 188. In *Backhouse v. Bonomi*, 9 H. L. Cases, 503, the doctrine declared by the author from whom we have quoted is asserted. There is however a later English case which seems to break in upon the rule of the earlier cases, and to shake in some degree at least their authority. It does indeed expressly overrule the case of *Lamb v. Walker*, 3 Q. B. Div. 889. The case to which we refer is *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125. If that case can be regarded as well decided it must be deemed an exception to the general rule, for the general rule is that one action, and one only, can be maintained for a breach of duty constituting a tort. The English court seems to have gone still further in opposition to the ancient rule in *Brunsdon v. Humphrey*, 24 Am. L. Reg. 869, but in that case Chief Justice COLERIDGE dissented, and an able reviewer says: 'It certainly seems that the reasoning of COLERIDGE, C. J., in the principal case is more in harmony with the established rules of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below, 11 Q. B. 712, were on the same side, so that really the majority of those judges who have expressed opinions on the subject are against successive actions in such cases. *Brunsdon v. Humphrey*, 24 Am. L. Reg. (N. S.) 878.

"These English cases may however be discriminated from the one we are discussing, for in this case the improvement of the street was a permanent one, while in the only one of these English cases that is analogous to the present, the act out of which the wrong arose was of a different character. The case before us is clearly analogous to the seizure of land under the right of eminent domain for railroad or highway purposes, and in all such cases it is held, both by the English and the American courts, that all the damages, present and prospective, must be assessed in one proceeding. *Lafayette, etc., Co. v. New Albany, etc., R. Co.*; 18 Ind. 90; *Montmorency etc., Co. v. Stockton*, 43 Ind. 328; 1 Suth. Dam. 191.

"In the case of *Powers v. Council Bluffs*, 45 Iowa, 652; s. c., 24 Am. Rep. 792, the city cut a ditch along the side of the plaintiff's lot and caused his lands to be overflowed, and it was declared that the cause of action was com-

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plete when the unlawful act was committed, and that all of the damages accruing from the original wrong must be included in one action. It is true that this case has been criticised, but the criticism does not affect its force upon the point to which we cite it. Wood Lim. Act. 872. The criticism upon the case is that the court erred in holding that the cause of action accrued when the ditch was dug, for the reason that no damages at all accrued until some time after the ditch was dug, and until the damages did accrue there was no complete cause of action. Conceding, but not deciding that the criticism is just, it does not break the force of the decision as applied to this case. for here there were both damages and injury before the first action was commenced, and Mr. Wood concedes, or rather affirms, that if the element of damages had been present in the case cited, the decision would be right. In *Town of Troy v. Cheshire R. R. Co.*, 23 N. H. 83, it was held that 'In case for nuisance, if the act done is necessarily injurious, and is of a permanent nature, the party injured may at once recover his damages for the whole injury.' In that case the injury to the town was done by the construction of a railroad and the court said: 'The injury done to the town is then a permanent injury at once done by the construction of the railroad, which is dependent upon no contingency, of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages.'

"It is true in the present case, as it was in the one referred to, that the improvement of the street was a permanent one, and as it was permanent, the cause of action was complete when damages resulted, and the recovery must be, not for part of the damages, or for some damages, but for all the damages resulting from the wrong which constituted the cause of action. Turning to a somewhat different line of cases, we find running through them all the same general principles found in the cases we have cited. Thus in actions against an attorney for negligence, the rule is that all the loss resulting from the wrong must be recovered in one action, and no subsequent action can be maintained. *Wilcox v. Plummer*, 4 Pet. 172; *Moore v. Juvenal*, 92 Penn. St. 434; *Campbell's Adm'r v. Boggs*, 48 Penn. St. 524; *Downy v. Garard*, 24 Penn. St. 52; *Miller v. Wilson*, 24 Penn. St. 114; *Owen v. Western Saving Fund*, 97 Penn. St. 47; s. c., 39 Am. Rep. 794; *Howell v. Young*, *supra*.

"In *Owen v. Western Saving Fund*, *supra*, the last case cited was approved, and it was said of it: 'And in this case it was held that special damages resulting from a breach of duty do not constitute a fresh ground of action, but are merely the measure of the injury resulting from the original cause.' The general principle we are discussing was involved in the case of *Richardson v. Eagle Machine Works*, 78 Ind. 422; s. c., 41 Am. Rep. 584, where it was held that an agent who elected to bring an action for wages could not bring a second action to recover damages for a breach of the contract, stipulating that the employment should continue for one year.

"In *Crosby v. Jeroloman*, 87 Ind. 264, the court quoted with approval from the opinion in *Secor v. Sturgis*, 16 N. Y. 548, the following: 'I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract.'

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"The general rule, as stated by a recent author, is this: 'When a wrongful act is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independent of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action.' 3 Suth. Dam. 408.

"In *Adams v. Hastings, etc., R. Co.*, 18 Minn. 260, this rule was enforced. The court, speaking of the construction of a railroad, said: 'And if such erection necessarily caused the surface water to stand upon plaintiff's land or run into his cellar and well, he could recover therefor in this action, though such injury might not accrue for some time after the completion of such illegal act, viz., the making of the road-bed and track.' This general principle is also maintained in *Seely v. Alden*, 61 Penn. St. 302.

"There are many cases declaring and enforcing the general rule that the plaintiff may recover in one action all the damages he suffers, whether retrospective or prospective, where the injury which causes the loss or harm is of a permanent character, as a street, a canal or a railroad. All things that proximately contribute to the injury may be taken into consideration in estimating the damages, and if the injury extends so far as to totally destroy the value of the property then damages equal to the value of the property may be awarded. Mr. Freeman states the rule very strongly. His statement is this: 'All the damages which can by any possibility result from a single tort, form an indivisible cause of action.' He also says: 'For damages alone no action can be permitted. Hence if a recovery has once been had for the unlawful act, no subsequent suit can be sustained.' Freeman Judg., § 241. The cases of *Cadle v. Muscatine Western R. Co.*, 44 Iowa, 11; *Finley v. Hershey*, 41 Iowa, 389; *Illinois Central R. Co. v. Grabill*, 59 Ill. 241; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush, 382; *Jeffersonville, etc., R. Co. v. Esterle*, 18 Bush, 667, illustrate and enforce the principles we are discussing.

"In *Fowle v. New Haven, etc., Co.*, 112 Mass. 334; s. c., 17 Am. Rep. 106, language is used which so forcibly applies here that we quote it: 'The case at bar,' said the court, 'is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury.'

"As probable future damages may be taken into consideration in an action to recover for a loss caused by the negligence of corporate officers in constructing a public work of a permanent character, the plaintiff in such an action can recover all the damages he has sustained, and in such cases no second action can be maintained. To permit a second action to recover damages resulting from the negligent grading of a street, would be to allow successive damages to be awarded where there was no fresh wrong. Great injustice would almost inevitably result from a rule permitting successive actions, for it would be impossible to prevent damages from being twice assessed for the same wrong.

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“The ultimate conclusions to which these authorities lead are: First—That where there is one cause of action all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong a second action cannot be maintained. Second — Where the cause of action is the negligence and unskillfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action, and in a suit on that cause of action all damages, present and prospective, may be recovered, and for fresh damages resulting from the improvement a second action will not lie.”

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(26 W. Va. 829.)

Notary public — negligence.

No action lies against a notary public for defectively certifying a married woman's acknowledgment of a deed, unless he acted maliciously or corruptly. (See note p. 148.)

TRESPASS on the case for negligence. The opinion states the case. The defendant had judgment below.

R. S. Blair, for appellant.

W. L. Cole, for appellee.

SNYDER, J. Action of trespass on the case brought in the Circuit Court of Wood county by Josiah Henderson against William H. Smith to recover \$1,000 damages sustained by the plaintiff by reason of the gross negligence and unskillfulness of the defendant in taking the acknowledgment of a certain trust-deed. The declaration contained three counts to all of which the defendant demurred. The court overruled the demurrer, the defendant pleaded not guilty and also special pleas upon which as well as the plea of not guilty issues were joined. The case was tried by a jury and a verdict found for the defendant, which the plaintiff moved the court to set aside, but the court overruled the motion and on May 30, 1881, entered judgment for the defendant. During the trial exceptions were taken to certain instructions and rulings of the court, and to review alleged errors in said rulings, the plaintiff obtained this writ of error.

All the evidence is certified, and as there is no conflict in the material parts of it, it may be treated as a certificate of the facts. The substance of the case thus certified is as follows :

The plaintiff, Henderson, having on deposit to his credit in the First National Bank of Parkersburg, of which W. N. Chancellor was cashier and the defendant teller, agreed to loan said money to Anton Doerr upon the note of Doerr payable twelve months after date with interest, to be secured by a trust-deed executed by Doerr and wife to K. B. Stephenson, trustee, upon a house and lot in Parkersburg, of which the wife was the owner of the fee. The plaintiff employed said Stephenson, who was a practicing attorney at law in Parkersburg, to prepare and have said note and trust-deed executed, and directed said Chancellor as cashier of the bank to let Doerr have the money when Stephenson prepared the papers and brought them to the bank signed and executed. Accordingly, on April 5, 1870, Stephenson prepared the note and trust-deed, the note was signed by Doerr and the deed by Doerr and his wife, and then Stephenson took the deed to the defendant, who was then a notary public, and requested him to take and certify the acknowledgment of Doerr and wife which he did in the words following :

“WOOD COUNTY, WEST VIRGINIA, *to-wit* :

“I, W. H. Smith, Jr., a notary public within and for the county of Wood and State aforesaid, do hereby certify that Anton Doerr, whose name is signed to the foregoing deed, bearing date the 5th day of April, 1870, personally appeared before me in my county aforesaid and acknowledged the same to be his act and deed. And I do further certify that Delia Doerr, wife of said Anton Doerr, whose name is also signed to the foregoing deed, bearing date the 5th day of April, 1870, personally appeared before me in my county aforesaid, and being examined by me privily and apart from her said husband, and having the deed aforesaid fully explained to her, she, the said Delia Doerr, acknowledged the same to be her act and deed. Given under my hand this 6th day of April, 1870.

“W. H. SMITH, *Notary Public.*”

The deed was recorded on the same day it was acknowledged, and then taken to Chancellor, and he, as cashier, paid over the money to Doerr, as he was directed by the plaintiff. Chancellor was not certain whether the defendant or Stephenson brought the

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deed to him when the money was paid over, but from all the circumstances I think it may be safely assumed that it was done by Stephenson, as the defendant never had the note, and it, as well as the deed, must have been delivered to Chancellor before he paid over the money. The plaintiff was not in Parkersburg at the time the deed was executed and the money paid over. When the note became due Doerr was insolvent, the trust-deed was declared by a decree of the Circuit Court of Wood county void as to Doerr's wife on account of the defective acknowledgment and certificate aforesaid, and by reason thereof the plaintiff lost the greater part of the said \$1,000.

The question presented by this case is the extent of the liability of a notary public for taking and certifying a defective acknowledgment and privy examination of a married woman to a deed. The question is one of great importance and is of first impression in this State. In fact there are but very few cases, so far as I can find anywhere, on this particular question. The law seems to be well-settled, that a notary who fails to make a protest of negotiable paper when it is required, or who neglects to give proper notice to the parties to be charged in case of dishonor, will be unquestionably liable for the loss occasioned thereby. In such matters he is regarded as standing in precisely the same position as any other agent who may be employed about a particular business, and will be held responsible for his negligence and mistakes when loss is occasioned thereby to the party employing him. *Marston v. Bank*, 10 Ala. 284; *Allen v. Merchants' Bank*, 22 Wend. 215; s. c., 35 Am. Dec. 289; *Warren Bank v. Parker*, 8 Gray, 221; *Bowling v. Arthur*, 34 Miss. 41; *Dorchester Bank, etc. v. New England Bank*, 1 Cush. 177.

It was held however in *Commercial Bank v. Varnum*, 49 N. Y. 269, that where a notary is directed to protest a bill on the wrong day by a bank which employs him for that purpose, he is not presumed to be a lawyer who is to revise the decision of his employer as to the character of the bill, and he cannot be held liable for following his instructions.

Proffatt, in his work on Notaries, § 64, says: "Notaries are required to give bond in a majority of our States, for the true and faithful discharge of their duties. The question will arise as to the nature and extent of this guaranty, and as to what particular acts or omissions it provides against. Does it insure one against the unskillfulness or incapacity of the notary in the discharge of his

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official acts, or does it merely assure against his negligence? There can be no question whatever that it does give a guaranty against his negligence, for it could hardly be maintained that he discharges his duties faithfully when he is guilty of negligence in his official acts; but it is quite a different question whether he can be held liable on his official bond for incapacity or mistake, when he acts in good faith to the best of his ability. There is no doubt, if he assumes to act in a given case as one possessing the requisite ability or skill, he can be held as any other agent, for any loss by reason of his incapacity, but then it can hardly be said he is guilty of unfaithfulness. For instance suppose in taking an acknowledgment, he has put before him, as is frequently the case, a certificate drawn by an attorney of one of the parties, and that he duly attests it with his signature and official seal, and that afterward it turns out the certificate is invalid for some omission or informality, and loss is sustained thereby, is he liable on his official bond for the damages thus occasioned? We think this would depend on the nature of the omission, as whether he omitted to certify to a fact to which he must certify as having personal cognizance. A case in California illustrates the position laid down above, and perhaps holds the notary to a stricter liability than would be the case elsewhere; but it was based on the statute which provided 'for any misconduct or neglect of duty in any of the cases in which any notary public appointed under the authority of this State, is authorized to act * * he shall be liable on his official bond to the parties injured thereby for all damages sustained.' In this case the notary took the acknowledgment of a mortgage, and omitted to state in his certificate, as required by the statute, that the party acknowledging it was known to him, or was identified by the testimony of a witness examined for that purpose. * * * The mortgage thus recorded was held insufficient to give notice to a subsequent purchaser, and the result was that the party lost the security of his debt, as the mortgagor was insolvent. The notary was held liable on his official bond for the amount of the debt and interest."

In this State notaries are appointed by the governor to hold their offices during good behavior. They are required to take the oath of office and give bond in the penalty of not less than \$250, nor more than \$1,000, "for the faithful discharge of their duties and for accounting and paying over as required by law all money which may come to their hands by virtue of the said office." They are

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also authorized to take the "acknowledgments of deeds and other writings, and the privy examination of married women respecting the same," and they are authorized to charge the fees for their services, chaps. 10 and 51, Code; chap. 4, acts 1881, and chap. 20, acts 1882.

By the common law a married woman could not by joining her husband in a deed bar herself or those claiming under her of her own estate. In process of time however fines and recoveries were introduced for the purpose and by them the rights of the wife might be successfully transferred. But to prevent imposition upon her, it was subsequently provided by statute that where a *feme covert* was one of the parties to a fine she should be privily examined, and if she refused her assent the fine could not be levied. Thus while the privy examination was positively enjoined by the statute, yet if the wife was allowed to acknowledge the fine without such examination, she was nevertheless bound by it, for it was held to be a judicial proceeding the record of which could not be contradicted except for fraud in the conusee whom equity would in such case consider a trustee for her. Such was the law in England when this country was first settled and for a long time after.

Early in the history of Virginia a deed accompanied by a privy examination of the wife was made a substitute for the fine, and was given by statute the same effect. At first this privy examination could only be taken before a court of record, or two justices of the peace. In both cases the same requisitions were necessary. In both it was required that the deed should be shown to the wife and explained to her, that she should acknowledge it as her act and declare that she had willingly and freely signed, sealed and delivered it. Thus the law remained in Virginia until the revision which resulted in the Code of 1849. By that Code it was for the first time provided in that State that a notary public might take the privy examination of a married woman. The same statute provided the form in which such examination should be made and certified. Code Va., §§ 3 and 4, ch. 121. This form is substantially the same as the one previously required in that State, and is identical with the one adopted and in force in this State. §§ 3 and 4, ch. 73, Code.

In *Harkin v. Forsyth*, 11 Leigh, 294, 302, and decided in 1840, the court in its opinion says: "Where this examination has been made in court it must be conceded that it is altogether conclusive,

and that no allegation can be admitted to contradict the entry upon record, however much that it may be at variance with the real facts. Though the judge or justice who may have examined her (the married woman) may have disregarded every requisite of the statute, yet when the term is once ended the truth of the record never can be questioned, but the examination must be taken to have been in truth what by the record it appears to have been." The opinion then proceeds to show that an acknowledgment and privy examination taken *in pais* by two justices is of the same nature and must be given the same effect as if they had been taken before a court and entered upon its records. Such being the case, it seems to me, to follow as an unavoidable consequence, that by authorizing a notary public to take such acknowledgments and privy examinations, the legislature must have intended to confer upon them duties of the same nature then and theretofore exercised by courts and justices, and to give their acts the like dignity and conclusive effect.

The reason as well as the nature and history of the subject shows that the official act of taking the privy examination of a married woman, whether done by a court, justice or notary, is a judicial act, or as it is sometimes designated, a *quasi-judicial* act. I have examined quite a number of authorities on this subject and all of them without exception hold or treat such act as judicial in its nature. The following are some of the cases referred to: *Harkins v. Forsyth, supra*; *Jamison v. Jamison*, 3 Whart. 457; S. C., 31 Am. Dec. 536; *Wasson v. O'Connor*, 54 Miss. 352; *Neal v. Taylor*, 9 Bush, 380; *Hunter v. Glasgow*, 74 Penn. St. 79; *Wilson v. Traer*, 20 Iowa, 233; *Stevens v. Hampton*, 40 Mo. 404.

In 11 Leigh, 307, the court says in regard to the statute: "It has authorized them (two justices) to take that privy examination which in the levy of a fine constituted part of a judicial proceeding and never could be contradicted. It has empowered them to take and certify the examination and acknowledgment, which it also makes one of the functions of its courts of justice, and thus it appears to invest them with an authority judicial in its nature."

In *Jamison v. Jamison, supra*, the court says: "The judge or justice of the peace in taking an acknowledgment acts judicially, not ministerially. The law imposes on him the duty of ascertaining by his own view and examination the truth of the matters to which he is to certify, and points out his precise duty. 3 Whart. 469; *Hall v. Patterson*, 51 Penn. St. 289.

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This court, in *Tavener v. Barrett*, 21 W. Va. 658, decided that where a trust deed is acknowledged by a husband and wife before a notary who is one of the trustees in the deed, the acknowledgment and privy examination as to the wife is an absolute nullity. Judge GREEN, in delivering the opinion of the court, approving and adopting the language used by the court in *Stevens v. Hampton*, *supra*, says: "The objection to the trustee taking such acknowledgment is analogous to the one forbidding a judge to pass upon his own case. Though this act may not be strictly judicial, it is of a judicial nature and requires disinterested fidelity." 21 W. Va. 688.

In *Kerr v. Russell*, 69 Ill. 666; s. c., 18 Am. Rep. 634, the court, in a well-considered and able opinion, held as the necessary conclusion both of reason and the decided cases, that "The act of an officer in taking the privy examination of a wife and her acknowledgment of a deed is in the nature of a judicial act, and no other evidence than the certificate can be received to prove the fact." *Euner v. Thompson*, 46 Ill. 221; Proffatt Notaries, § 155.

The liability of a public officer to an individual for his negligent acts or omission in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain and imparative, involving merely the execution of a set task—that is, if the duty is simply ministerial—he is liable in damages to any one specially injured either by his omitting to perform the task or duty, or by his performing it negligently or unskillfully. On the other hand, when his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them where no corruption or malice can be imputed, and he keeps within the scope of his authority. It has been laid down as a general principle that if a public officer in such cases simply errs in the discharge of his duty he is not liable. *Donahoe v. Richards*, 38 Me. 376; *Reed v. Conway*, 20 Mo. 22; *Allen v. Blunt*, 3 Story, 742; *Kendall v. Storks*, 3 How. 87.

An officer possessing such discretionary powers is spoken of as a judicial or *quasi-judicial* officer from the likeness of his discretionary functions to those of a judge who decides controversies between individuals.

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Judges of courts of record are never accountable in damages for their judicial acts within their jurisdiction, even if they act corruptly or oppressively, being in such case impeachable only. *Yates v. Lansing*, 9 Johns. 395; s. c., 6 Am. Dec. 290; *Taylor v. Moffatt*, 2 Blackf. 305.

The judicial privilege is enjoyed by the judges of inferior as well as those of the superior courts. But as these exercise special and limited powers no presumption of jurisdiction is made in their favor; and even where they act within their jurisdiction the act complained of must have been done honestly and in good faith to exempt them from liability; that is, they are not liable unless they acted from malicious, impure or corrupt motives. *Gregory v. Brown*, 4 Bibb, 28; *Howe v. Mason*, 14 Iowa, 510; *Briggs v. Wardwell*, 10 Mass. 356.

Persons exercising judicial functions, by whatever name they may be called, enjoy the protection of this judicial privilege. Indeed, any officer sworn to act faithfully, according to the best of his ability, and according as things shall appear to him, is a judicial officer within the rule. Thus jurors in determining their verdict act judicially. So do courts-martial, election officers, commissioners in bankruptcy, etc. See *Shear. & Red. on Neg.*, §§ 156 to 169, and cases cited.

The same officer may be charged with both judicial and ministerial duties. When he is in the exercise of the latter, that is, purely ministerial functions, he is of course not protected by the judicial privilege. He is liable for negligence like every other ministerial officer. There is a distinction between those officers whose duties are of a general public nature and who act for the profit of the public at large and that other class of officers who are appointed to act, not for the public in general, but for such individuals as may have occasion to employ them for specific fees paid. The same officer may have duties assigned to him by law of both classes of these duties. In our State justices, constables, notaries and sheriffs may be regarded as such, because these officers are made by statute conservators of the peace for which they receive no pay from individuals, while at the same time they each and all receive fees for services performed by them for individuals. But in the matter now before us this distinction is not very material. The important distinction is between judicial or *quasi-judicial* functions and purely ministerial acts or duties. When the act

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done is of the latter character, whether done by a *quasi-judicial* or a ministerial officer, there never has been any question that the officer is liable in damages for any act of negligence or abuse of his office to any individual specially injured thereby. *Robinson v. Chamberlain*, 34 N. Y. 389; *Adsit v. Brady*, 4 Hill, 630; s. c., 40 Am. Dec. 305; *Hover v. Barkhoof*, 44 N. Y. 113.

I do not think there can be any question, according to both reason and authority, that the official act of taking and certifying the acknowledgment and privy examination of a married woman to a deed, whether done by a court, justice or notary, is in its nature a judicial act; and that the officer is not liable in damages for such act, however imperfectly he may perform it, unless he acted from malicious, impure or corrupt motives. It is a duty which requires judicial discretion, and therefore to exempt the officer from liability it is only necessary that he should act honestly and in good faith according to the best of his skill and judgment.

This conclusion is adverse to the case of *Fogarty v. Finley*, 10 Cal. 239, *supra*, unless that case can be considered as simply an interpretation and enforcement of the California statute. We have no such statute; and if that case can be regarded as founded on the general law, it stands alone, unsustained by the decision of any other court, so far as I have been able to discover, and it is therefore disapproved as being unsupported by either reason or authority.

In the case at bar, it is not alleged in the declaration or attempt to be proved that the defendant acted either corruptly or maliciously. All the plaintiff alleges or offers to prove is that the defendant acted negligently and unskillfully. The defect in the certificate is the omission of the essential words, that the wife "declared she had willingly executed the same and does not wish to retract it." § 4, chap. 73, Code, p. 470. This was unquestionably a fatal defect. *Watson v. Michael*, 21 W. Va. 568; *Grove v. Zambro*, 14 Grat. 501.

This defect is apparent upon the face of the certificate, and it might therefore be regarded, as insisted by the defendant in error, that the loss sustained by the plaintiff was not the direct result of the negligence of the defendant, but that the proximate cause of the loss was the negligence and want of care on the part of the plaintiff or his attorney in having the deed so defectively acknowledged placed upon record and paying or loaning the money upon it. *Washington v. B. & O. R. Co.*, 17 W. Va. 190; *Lowery v. Telo-*

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graph Co., 60 N. Y. 198; s. c., 10 Am. Rep. 154; *Pennsylvania R. Co. v. Kerr*, 62 Penn. St. 353; s. c., 1 Am. Rep. 431; *McClung v. Sioux R. Co.*, 3 Neb. 44.

Having thus reached the conclusion that the plaintiff was not entitled to relief upon the case made by his declaration, nor upon the facts proved, it is unnecessary to consider the many objections and exceptions taken to the rulings of the court during the trial. The demurrer to the declaration should have been sustained. For the reasons aforesaid the judgment of the Circuit Court in favor of the defendant is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Oakland Bank of Savings v. Murfey*, California Supreme Court, January, 1886, the following is an abstract of the case: In November, 1876, one Leroy came to the office of the defendant, a notary public, introduced himself as M. B. West, and requested defendant to draw a deed to certain land from him to Henry Harmon. The defendant prepared the deed, Leroy signed the name M. B. West, and in that name acknowledged the execution. The defendant thereupon made and affixed to the deed his certificate, certifying in substance that M. B. West, the person described in and who had executed the deed as grantor, was personally known to him, and had acknowledged before him, on the day named in the certificate, that he executed the deed. Having affixed his notarial certificate, defendant handed the deed to Leroy and he carried it away. Subsequently Leroy presented himself at the banking house of the plaintiffs, introduced himself under the name "Henry Harmon" to Mr. E. C. Sessions, the plaintiffs' president, stated that he desired to borrow \$4,000 on the lot, seventy-five by eighty feet, at the north-east corner of Grove and Fifteenth streets, in Oakland. Mr. Sessions had a block-book of Oakland before him, and turning to the lot mentioned saw that it stood in the name of M. B. West, and so stated to Leroy who, by way of explanation, said that he had made a trade with West by which West was to convey to him this lot in Oakland in exchange for a gravel mine and a cash payment; that West had made the deed, and left in escrow, and he wanted the money to enable him to make the cash payment and close the transaction. The examination of the title was then referred to the plaintiff's searcher, who reported the record title in M. B. West. Then a note and a mortgage, in which "Henry Harmon of Butte county" was named as mortgagor, and the plaintiff as mortgagee, were prepared. A day or two later Leroy again presented himself at the president's room in the bank and handed Mr. Sessions the forged deed. He looked at it, and then took Leroy to Garthwait, the note teller, and requested him to attend to the note and mortgage. Garthwait handed the papers to Dusenberry, one of the tellers, who was also a notary. Leroy then signed the name "Henry Harmon" to the note and mortgage, and Garthwait signed his name as witness. Dusenberry thereupon, as notary, made and attached to the mortgage his certificate, certifying in sub-

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stance that Henry Harmon, the person described in and who had executed the mortgage, was personally known to him, and had acknowledged before him on the day named in his certificate, that he executed the mortgage. The deed and mortgage were then sent by the plaintiff to the recorder's office for record, and the \$4,000, less \$110 for interest and charges, was paid over. No one of the officers of the plaintiff had ever seen Leroy until the day he first came and introduced himself to Mr. Sessions as Henry Harmon, nor was any inquiry made by any one of them at any time during the negotiations for the loan as to his identity. *Held*, in an action to recover upon the bond of the defendant that the latter was not liable to the plaintiff, that the negligence of the defendant was not the proximate cause of the loss, but that the plaintiff's negligence was the proximate cause of its loss.

In *Scotton v. Fegan*, 62 Iowa, 286, it was held that where a statute makes any officer liable who "knowingly mis-states" any thing in a certificate, a notary public is not liable for simply negligently mis-stating. The court said: "We do not say that there would be no liability in the absence of a statute," but they hold that the statute limits it.

In such cases the plaintiff must prove a clear and intentional dereliction of duty. *Com. v. Haines*, 97 Penn. St. 228; s. c., 39 Am. Rep. 805.

If a notary certifies that he is personally acquainted with a grantor, when he is not, he is liable for an imposition, although he believed the certificate otherwise to be true. *State v. Meyer*, 2 Mo. App. 412.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BAKER V. NEW YORK NATIONAL BANK.

(100 N. Y. 81.)

Agency—notice of trust to bank.

An insolvent firm of commission merchants opened a bank account in their name, adding the word "agents," in order to protect the principal. The bank knew of that purpose. The agents deposited the proceeds of the principal's goods, and on settlement gave him a check to balance. *Held*, that the bank might not charge to that account a debt of the agents, even by their consent.

ACTION on a check. The head-note shows the facts. The plaintiff had judgment below.

Thos. Allison, for appellant.

E. More, for respondents.

ANDREWS, J. The relation between a commission agent for the sale of goods and his principal is fiduciary. The title to the goods until sold remains in the principal, and when sold, the proceeds, whether in the form of money, or notes, or other securities, belong to him, subject to the lien of commission agent for advances and other charges. The agent holds the goods and the proceeds upon

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an implied trust to dispose of the goods according to the directions of the principal, and to account for, and pay over to him the proceeds from sales. The relation between the parties in respect to the proceeds of sales is not that of debtor and creditor simply. The money and securities are specifically the property of the principal, and he may follow and reclaim them, so long as their identity is not lost, subject to the rights of a *bona fide* purchaser for value. In case of the bankruptcy of the agent, neither the goods nor their proceeds, would pass to assignees in bankruptcy for general administration, but would be subject to the paramount claim of the principal. *Chesterfield Manufacturing Co. v. Dehon*, 5 Pick. 7; s. c., 16 Am. Dec. 367; *Merrill v. Bank of Norfolk*, 19 Pick. 32; *Thompson v. Perkins*, 3 Mason, 232; *Knatchbull v. Hallet*, 13 Ch. Div. 696; *Duguid v. Edwards*, 50 Barb. 290; Story Agency, § 229. The relation between a principal and a consignee for sale is however subject to modification by express agreement, or by agreement implied from the course of business or dealing between them. The parties may so deal that the consignee becomes a mere debtor to the consignor for the proceeds of sales, having the right to appropriate the specific proceeds to his own use.

In the present case the bank account against which the check was drawn represented trust moneys belonging to the principals for whom Wilson & Bro. were agents. The deposits to the credit of this account were made in the name of the firm, with the word "agents" added. They were the proceeds of commission sales. Wilson & Bro. became insolvent in October, 1878, and they opened the account in this form for the purpose of protecting their principals, which purpose was known to the bank at the time. The check in question was drawn on this account in settlement for a balance due to plaintiffs, upon cash sales made by the drawers as their agents. It is clear upon the facts that the fund represented by the deposit account was a trust fund, and that the bank had no right to charge against it the individual debt of Wilson & Bro. The bank having notice of the character of the fund could not appropriate it to the debt of Wilson & Bro., even with their consent to the prejudice of the *cestui que trusts*. The supposed difficulty in maintaining the action arising out of the fact that the money deposited was not the specific proceeds of the plaintiffs' goods, is answered by the case of: *Van Alen v. American Nat. Bank*, 52 N. Y. 1. Conceding that Wilson & Bro. used the specific proceeds for their

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own purposes, and their identity was lost, yet when they made up the amounts so used, and deposited them in the trust account, the amounts so deposited were impressed with the trust in favor of the principals, and became substituted for the original proceeds and subject to the same equities. The objection that the deposit account represented not only the proceeds of the plaintiffs' goods but also the proceeds of goods of other persons, and that the other parties interested are not before the court, and must be brought in in order to have a complete determination of the controversy, is not well taken. The objection for defect of parties was not taken in the answer, and moreover it does not appear that there are any unsettled accounts of Wilson & Bro. with any other person or persons for whom they were agents. The check operated as a setting apart of so much of the deposit account to satisfy the plaintiffs' claim. It does not appear that the plaintiffs are not equitably entitled to this amount out of the fund, or that there is any conflict of interest between them and any other person or persons for whom Wilson & Bro. acted as consignees. The presumption, in the absence of any contrary indication, is that the fund was adequate to protect all interests, and that Wilson & Bro. appropriated to the plaintiffs only their just share.

We are of opinion that the judgment was properly directed, and it should therefore be affirmed.

Judgment affirmed.

All concur.

CRAWFORD V. WEST SIDE BANK.

(100 N. Y. 50.)

Bank—check—alteration.

The plaintiff, contemplating an absence for a few days, on April 20 drew his check on the defendant bank, dated April 22, payable to his clerk, and left it with the clerk with directions to draw the money on the 22d, if he did not return before noon, and give it to the foreman to pay off employees. The clerk altered the date to the 21st, drew the money on that date and absconded. The plaintiff did not return until after the time appointed. *Held*, that the defendant might not charge the check to the plaintiff's account.

ACTION for balance of a deposit. The head-note states the case. The defendant had judgment at trial, which was reversed at General Term.

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John C. Shaw, for appellant.

D. M. Porter, for respondent.

RUGER, C. J. The relation existing between a bank and its depositor is, in a strict sense, that of debtor and creditor; but in discharging its obligation as a debtor the bank must do so subject to the rules obtaining between principal and agent.

In disbursing the customer's funds, it can pay them only in the usual course of business and in conformity to his directions. In debiting his account it is not entitled to charge any payments except those made at the time when, to the person whom, and for the amount authorized by him. *Wheeler v. Guild*, 20 Pick. 545; Dan. on Neg. Inst., § 1818. It receives the depositor's funds upon the implied condition of disbursing them according to his order, and upon an accounting is liable for all such sums deposited, as it has paid away without receiving valid direction therefor. The bank is from necessity responsible for any omission to discover the original terms and conditions of a check once properly drawn upon it, because at the time of payment it is the only party interested in protecting its integrity who has the opportunity of inspection, and it therefore owes the duty to its depositors of guarding the fund entrusted to it from spoliation. This liability arises, although an alteration of a material part of his order has been effected, even though it be done so skillfully as to defy detection by examination. Dan. on Neg. Inst., § 1660. This follows from the fact that after it is put in circulation it passes beyond the reach of its maker, who has no opportunity until after it has fulfilled its office, of inspecting it and protecting himself from the loss occasioned by a fraudulent alteration. This opportunity the banker has and he is responsible for any want of vigilance in detecting an alteration of an order after it has once been correctly drawn, with its blank places properly filled up, and is put in circulation by the maker.

The liability of the banker however for a loss occasioned by neglect to exercise such vigilance is confined to the maker alone. So far as other parties, through whose hands an altered check passes, are concerned, they have the same opportunity for detecting fraudulent alterations in the body of the check that the banker has, and as to them, after payment, he is responsible only for the genuineness of the maker's signature. *Bank of Commerce v. Union*

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Bank, 3 N. Y. 230. The principle stated in *White v. Continental Bank*, 64 N. Y. 316; s. c., 29 Am. Rep. 612; *Marine National Bank v. National City Bank*, 59 N. Y. 67; s. c., 17 Am. Rep. 305, and kindred cases, that the drawees of a check or bill are held to a knowledge of the signature only of their correspondents, the drawers, and not for a want of knowledge of the genuineness of the body of the instrument, applies only as between them and such other parties as have equal opportunity of inspection, and equal means for determining the existence of an alteration. Such parties take the paper relying solely upon the reputed responsibility of their transferrers and the other parties to it and its apparent genuineness, and they therefore deal in it at their peril. They have no duty to perform in respect to it except that of guarding their own interests, and in buying and transferring it to others they take the risk of loss, occurring from fraudulent alterations.

The questions arising on such paper between drawee and drawer however always relate to what the one authorized the other to do. They are not questions of negligence or of liability of parties upon commercial paper, but are those of authority solely. In this view it has been held when the check of a depositor was fraudulently altered from £3 to £300 after issue and was paid by the bank at the latter amount, that the bank was entitled to charge only £3 to the depositor. *Hall v. Fuller*, 5 B. & C. 750. BAILEY, J., said: "If the banker unfortunately pays money belonging to the customer upon an order not genuine he must suffer, and to justify the payment he must show that the order was genuine, not in the signature only, but in every respect."

The question of negligence cannot arise unless the depositor has in drawing his check left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come. *Young v. Grote*, 4 Bing. 253; Dan. Neg. Inst., § 1659.

The theory that a party who makes and issues commercial paper properly and carefully drawn, to express the liability which he intends to assume, is chargeable with negligence on account of the criminal act of another in altering it after its issue, would render him a warrantor against such acts and is repugnant to justice and reason.

In the present case the plaintiff, on the 20th of April, intending to be absent from his place of business for a few days, drew his check on the defendant, dated April 22, for \$700, payable to his

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clerk, one Morgan, for the purpose of enabling him to obtain funds to pay wages becoming due to the drawer's employees on the 22d. The check was left in the drawer's check-book in his safe, with directions to Morgan, who had a key to the safe, to take the check on the 22d, draw the money and deliver it to his foreman to pay out to the employees in case the drawer did not return before noon upon that day. The plaintiff did not return until after the time appointed, but on the 21st Morgan took the check and having altered the date to the 21st drew the money from the bank and absconded with the funds on the same day.

The check as drawn conferred no authority on the bank to pay it before its date. *Godin v. Bank of Commonwealth*, 6 Duer, 76; *Mohawk Bank v. Broderick*, 10 Wend. 304; s. c., 27 Am. Dec. 192; 13 Wend. 133. Such payment did not therefore justify the bank in charging the check to the plaintiff. The bank undoubtedly had the same right as any other person to purchase a post-dated check and enforce it against the drawer in case of his liability thereon. This right to enforce payment however depended upon the question whether the purchaser became a *bona fide* holder of the paper, and also whether it was then a valid obligation of the maker. A material alteration of its terms after execution and before payment would destroy its validity. A change in its date, whereby the time of its payment was accelerated, was undoubtedly such an alteration. Thus it was held in the case of *Vance v. Lowther*, 1 Exch. Div. 176; s. c., 16 Eng. Rep. 583, where the date of a check had been altered from March 2d to March 26th, and as thus altered was attempted to be enforced against the drawer by one who had paid value to an unlawful holder for it, that such alteration vitiated the check and no recovery could be had thereon.

Whenever the legal rights and liabilities of a maker of commercial paper are changed in a material respect by a fraudulent alteration of the obligation, such alteration vitiates the instrument, and the question whether it is material or not is one of law for the court. 2 Pars. Notes and Bills, 542; 2 Pars. Cont. 721; Dan. Neg. Inst. §§ 1373, 1658; *Booth v. Powers*, 56 N. Y. 29.

The absence of a date upon a negotiable instrument at its inception, or the fact that it is post or ante-dated, may not be material upon the question of its validity; but when a date has been once inserted and its time of payment has been thus fixed, such date is material and can not be altered without the consent of the maker.

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Dan. Neg. Inst., 1376-77, 1577-78; 2 Pars. Notes, 552; *Stephens v. Graham*, 7 Serg. & R. 505; s. c., 10 Am. Dec. 485.

In the present case the check was never a valid instrument for any purpose, because it had become vitiated by a fraudulent alteration before it had any inception. It never came into the hands of any person entitled to enforce it for any amount or for any purpose as against its maker. The whole object of the check had failed before the legally appointed time for its payment, by reason of the unauthorized act of the bank in paying it, and thereby enabling the fraudulent holder to abscond with its proceeds. The check was never therefore a legal obligation enforceable against the drawer by its owner and holder.

It is claimed by the appellant that even if it be held that the defendant had no authority to pay this check on the 21st, having become its owner and having kept it until after its true date, it was then entitled to charge it to the plaintiff, because it then corresponded not only as to amount, but as to the time of payment, with the obligation which the plaintiff intended to and did in fact assume. There is some authority for the proposition that a banker after payment has the right to hold an altered check for its correct amount as against the maker. *Hall v. Fuller, supra*; *Susquehanna Bank v. Loomis*, 85 N. Y. 207; s. c., 39 Am. Rep. 652; *Redington v. Woods*, 45 Cal. 406. In these cases however the checks had received a legal inception upon their delivery to holders for value, and as thus delivered authorized their drawees to pay them and debit the makers with the sum originally specified therein. Such instruments not only conferred authority to pay their true amount upon their drawees, but also created a legal liability in case of non-payment against their drawers for the repayment of that amount, and the right to enforce such power or liability would no doubt pass as an incident to the transfer of the check to any holder in good faith. 2 Pars. Bills and Notes, 582. But we cannot see how the principle stated in these cases can benefit the defendant, for the possibility that the check could ever become a legal liability in the hands of any person was destroyed by its fraudulent alteration before inception. In the hands of Morgan the check created no liability in his favor against its drawer. There never existed therefore either a valid written obligation against the plaintiff, or an original legal liability to any one enforceable after the destruction of the written instrument by its fraudulent alteration.

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The transfer of the check by Morgan under the circumstances could not therefore carry to another a right founded either upon the vitiated check or upon an original liability which never in fact existed.

When a negotiable instrument constitutes in itself the only obligation existing against its maker, all remedies thereon are lost by its fraudulent alteration, and the law refuses to create a new contract to supply the place of the one destroyed. *Booth v. Powers*, 56 N. Y. 31; 2 Pars. Bills, 572; *Meyer v. Hunske*, 55 N. Y. 412.

It follows that there is no principle upon which the defendant has the right to charge the check in question for any amount to the plaintiff.

The judgment should therefore be affirmed.

Judgment affirmed.

All concur.

ZOELLER V. RILEY.

(100 N. Y. 102.)

Mortgage — chattel — fraudulent — title of purchaser.

A purchaser in good faith on foreclosure of a chattel mortgage made to defraud creditors gets good title.

ACTION for conversion. The opinion states the case. The defendant had judgment below.

James D. Bell, for appellant.

Thos. E. Pearsall, for respondent.

EARL, J. On the 26th day of September, 1878, James Cavanaugh, being the owner of some carriages, horses and other chattels used in a livery stable kept by him in the city of Brooklyn, mortgaged them to Joseph H. Strauss to secure the payment to him of \$1,000 and interest on demand. Strauss took possession of the property under his mortgage January 21, 1879, and on that day caused it to be sold by auction, at which he purchased it for \$1,000. On the same day he sold it to Joseph Cavanaugh, a son of James, for \$1,000, and took from him a mortgage thereon to secure the whole purchase-price payable on demand. On the 19th day of

May, 1880, Strauss sold and assigned the mortgage to the plaintiff for the sum of \$750 paid to him, and he took possession of the property mortgaged. Thereafter Thomas M. Riley, as sheriff of Kings county, the defendant's intestate, seized and took from plaintiff's possession one of the carriages under an execution issued upon a judgment recovered against James Cavanaugh by James M. Quimby and others, and then this action was commenced to recover for the conversion of the carriage. The sheriff in his answer alleged that the carriage was the property of James Cavanaugh, and justified the taking under the judgment and execution named. Upon the trial the plaintiff's title and the taking were proved as alleged. The sheriff did not give formal proof of the judgment and execution, but they seem to have been assumed upon the trial without dispute, and we will assume them for the purposes of this appeal. At the close of the plaintiff's proofs the defendant put in evidence the proceedings had and judgment recovered in an action brought by Quimby and others against Joseph H. Strauss, Baldwin F. Strauss and James Cavanaugh, to recover damages for a conspiracy to defraud them in the collection of the same judgment against James Cavanaugh, upon which the execution above mentioned was issued, and another judgment, and claimed that by that judgment it was conclusively established that the mortgage executed by James Cavanaugh to Joseph H. Strauss, above mentioned, was fraudulent and void, and that the plaintiff was estopped by that judgment, and the trial judge so held, and nonsuited the plaintiff. The sole matter for our determination is the effect of that adjudication upon the rights of the plaintiff in this action.

In the conspiracy action the plaintiffs alleged the recovery by them of two judgments against James Cavanaugh, one for \$223.43, March 26, 1877, and another for \$498.51, April, 1877, and that the defendants had conspired and fraudulently done various things to defeat them in the collection of their judgments, and among other things they alleged that Cavanaugh had placed a mortgage of \$1,500 upon his livery property to Croghan and Haley, which was fraudulent and without consideration; that the defendants held out and pretended that one Louis Baer, a relative of the defendants Strauss, owned the property, and that Cavanaugh also gave the mortgage hereinbefore mentioned of \$1,000 to Joseph H. Strauss, which sum was not then due or owing to him. Upon the trial of that action evidence was given by the plaintiffs therein

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to establish the various acts of conspiracy and fraud alleged against the defendants, and the defendants gave evidence tending to show that the mortgages, and particularly the mortgage for \$1,000, were given for full consideration. The judge presiding at the trial of that action charged the jury that if the defendants were guilty of the wrongs alleged, the plaintiffs were entitled to a verdict for the damages sustained by them, which verdict should include the amount of the two judgments and interest and other damages caused to the plaintiffs. The jury rendered a verdict for \$1,300 against James Cavanaugh and Joseph H. Strauss, and found no cause of action against the other Strauss. Joseph H. Strauss appealed from the judgment entered against him to the General Term and from affirmance there to this court, and here the judgment was affirmed. 90 N. Y. 664.

We are of opinion that that judgment did not conclusively establish, as against the plaintiff, that the mortgage assigned to him was inoperative and void, and thus did not give him a valid lien upon or title to the carriage taken by the sheriff. (1.) It is not clear that the jury found in the conspiracy action that the mortgage for \$1,000 was fraudulent and without consideration. There was abundant evidence from which they could have found that that mortgage was based upon a full consideration, and that it was given to secure Joseph H. Strauss for an honest debt. The proof was very strong, if not conclusive, that Cavanaugh owed Croghan and Haley only about \$400, and that he gave the mortgage for \$1,500, for the express purpose of defrauding Quimby & Co. from collecting their debts, and the giving of that mortgage and other wrongful acts may have induced the verdict, while the jury found the other mortgage valid and free from fraud. It is sufficient to say that we cannot be certain that there was in that action any adjudication condemning that mortgage, and the burden was upon the defendant to establish that fact. *Clemens v. Clemens*, 37 N. Y. 59; *Russell v. Place*, 94 U. S. 606. (2.) Neither the plaintiff nor Joseph Cavanaugh was a party to that action, and therefore they were not bound by the adjudication therein. The action was originally commenced, against the defendants Strauss alone November 9, 1878. Subsequently James Cavanaugh was added as a party, and the amended summons and complaint were served upon him November 14, 1879. The action was tried and verdict therein rendered March 25, 1880, and the judgment was entered May 27, 1880. The livery

property was sold to Joseph Cavanaugh January 21, 1879, on which day he took possession thereof and executed the mortgage under which the plaintiff claims, and that mortgage was assigned to the plaintiff May 19, 1880. It is thus seen that long before the conspiracy action was commenced against James Cavanaugh, Joseph Cavanaugh had obtained his title to the property through a sale made under a power given by James. It matters not that he took his title immediately from Joseph H. Strauss, who was a party to that action, as the title came to him before verdict and judgment in that action. Therefore no adjudication made in that action subsequently to his purchase could bind him. *Freem. Judg.*, § 201; *Adams v. Barnes*, 17 Mass. 365; *Campbell v. Hall*, 16 N. Y. 575. There was no adjudication upon the plaintiff's mortgage or title in that action, and he has all the right and title which Joseph Cavanaugh had, and he holds under him. (3.) But there is a still more radical answer to the alleged estoppel. We may assume that it was established in the conspiracy action that the mortgage of James Cavanaugh was fraudulent, and made with intent to hinder and delay Quimby & Co. in the collection of their judgment, and yet the nonsuit cannot be upheld. Joseph Cavanaugh must here be deemed a *bona fide* purchaser of the property for value. Whether his title be deemed to have come from James Cavanaugh or Joseph H. Strauss, or from both of them, it was perfect against the whole world. Even if they intended fraud in the disposition of the property they made, they could give a good title to a *bona fide* purchaser for value, and such he was, as he gave his promissory notes for the property and paid one or more of them. A person who has purchased property under such circumstances that the seller could avoid it for fraud can yet give a good title to a *bona fide* purchaser for value. *Simpson v. Del Hoyo*, 94 N. Y. 189. So a debtor may dispose of his property with the intent to defraud his creditors and yet give a good title to one who pays value and has no knowledge of, and does not participate in the fraud. 2 R. S. 137, § 5; *Starin v. Kelly*, 88 N. Y. 418; *Murphy v. Briggs*, 89 N. Y. 446; *Parker v. Conner*, 93 N. Y. 118; s. c., 45 Am. Rep. 178. Therefore after the sale of this property to Joseph Cavanaugh it ceased to be the property of James Cavanaugh for any purpose. It had passed beyond the reach of his creditors and could not be seized for his debts except upon proof of a fraudulent intent by him and Joseph H. Strauss not only, but also upon proof assailing for fraud the pur-

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chase of Joseph Cavanaugh. Therefore if it should be held that the mortgage of James Cavanaugh to Strauss was fraudulent and void as to the judgment creditors of the mortgagor, that would not justify the seizure of the property in the possession of Joseph Cavanaugh, or of any one who purchased it from or under him.

It cannot be well claimed that this plaintiff's rights are in any way affected because the mortgage assigned to him was given and assigned while the conspiracy action was pending. That action was not commenced to determine the status of that mortgage, or of the prior mortgage, or of the property covered thereby, and that mortgage and that property were not the subject of that action. It was simply an action to recover damages for a conspiracy, and hence, certainly as no complaint had been filed, the pendency of that action was not notice to any one not a party thereto of any infirmity in or claim against either mortgage. *Leitch v. Wells*, 48 N. Y. 585.

The judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

PEOPLE V. CARR.

(100 N. Y. 236.)

Constitutional law — "judge" — surrogate.

A surrogate is not within the constitutional provision that "no person shall hold the office of justice or judge of any court" after becoming seventy years old.

MANDAMUS to the secretary of State requiring him to give notice of election of a surrogate. The opinion states the case. The relator had judgment below.

C. F. Tabor and Calvin Frost, for appellant.

M. L. Cobb, for respondent.

RAPALLO, J. The question to be determined on this appeal is whether the provision contained in section 13 of article 6 of the Constitution, to the effect that "no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age," applies to persons holding the office of surrogate.

The important judicial functions exercised by surrogates may afford reason for applying to them a disqualification by age, similar to that prescribed with respect to judges and justices of courts referred to in the Constitution. But the question before us is not, whether the disqualification should have been extended to those officers, or whether it should be deemed by analogy to apply to them, but whether by the terms of the Constitution they are included in it under the designation of persons holding the office of "judge or justice of any court."

For the purpose of determining this question, it is necessary in the first place to consider the context in which the language quoted is used in section 13 of article 6, and also other provisions of article 6 of the Constitution, the whole of that article having been adopted by the vote of the people at the same time, in 1869, as a separate article known as the judiciary article. Section 2 of article 6 establishes a Court of Appeals, to be composed of a chief judge and six associate judges, to be elected, and to hold office for the term of fourteen years. Section 6 provides for the continuance of the existing Supreme Court, to be composed of the justices then in office, with an additional justice to be elected.

Section 12 provides that the Superior Court of the city of New York shall be composed of six judges, and the Court of Common Pleas of the same city, of the three judges then in office and three additional judges; the Superior Court of Buffalo of the judges then in office and their successors, and the City Court of Brooklyn of such number of judges, not exceeding three, as may be provided by law.

Section 13 provides for the election of justices of the Supreme Court and of judges of all the other courts mentioned in section 12, and declares that the official terms of the said justices and judges who shall be elected after the adoption of the article shall be fourteen years, and then follows immediately, in the same section, the provision, "but no person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age." Section 14 next follows, providing that a compensation shall be established by law for the services of the judges and justices hereinbefore mentioned, which shall not be diminished during their official terms.

It must be observed that up to this point no person has been designated in the Constitution as a judge or justice of any court

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except the judges of the Court of Appeals, the justices of the Supreme Court, and the judges of the Superior Court and Court of Common Pleas of the city of New York, of the Superior Court of the city of Buffalo and of the City Court of Brooklyn.

That the limitation as to age was intended to apply to the judges and justices of those courts is too clear to be capable of misapprehension. The only other officers or body having judicial powers, mentioned in the sections of article 6, preceding section 13, are the Commission of Appeals. That high tribunal had power, under section 4, to hear and determine certain of the causes pending in the Court of Appeals, and by section 5, it was provided that the decision of the Commission should be entered and enforced as the judgments of the Court of Appeals. But the Commission was not designated in the Constitution as a court, nor the commissioners as judges but as commissioners, and it was therefore assumed that the disqualification of age under section 13 did not apply to them, for it is a matter of history that one venerable commissioner held his office without question for several years after he had passed the age of seventy, and in the case of *Settle v. Van Evrea*, 49 N. Y. 280, it was decided that section 27 of article 6, which prohibits any judge of the Court of Appeals from acting as referee, did not apply to a commissioner, because he was not a judge of the court.

All the provisions of article 6 of the Constitution bearing upon the question at issue, which precede sections 13 and 14, have now been examined, and we next come to section 15, relating to County Courts. This section continues the existing County Courts and provides that the judges thereof then in office shall hold their offices until the expiration of their respective terms, and that their successors shall be chosen by the electors of the counties for the term of six years. These judges come literally within the words of the Constitution, for they are judges of courts, designated as such by the Constitution. *People v. Gardner*, 45 N. Y. 812; *People v. Brundage*, 78 N. Y. 403. No judicial officer, other than those who have been already named, is in any part of the Constitution designated as a judge or justice of any court.

Justices of the peace are mentioned in section 15, and they exercise judicial powers. Two justices of the peace, together with the county judge, compose courts of sessions with such criminal jurisdiction as the legislature shall prescribe, and such justices may also exercise jurisdiction to a limited extent in civil cases, and may

hold courts for that purpose. At the same time they exercise other powers. They are in numerous sections of the Constitution designated, not as judges or justices of any court, but as justices of the peace, and are elected under that designation, and on these grounds it was decided in the late case of *People v. Mann*, 97 N. Y. 532; s. c., 49 Am. Rep. 556, that they did not come within the disqualification by age contained in section 13 of article 6.

Surrogates are throughout all the provisions of article 6 designated as officers by that name, and not as judges or justices of any court. By section 15 of article 6 it is provided that the county judge shall also be surrogate of his county, but that in counties having a population exceeding forty thousand, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of the county judge, which is six years. By section 16 the legislature is empowered, on application of the board of supervisors, to provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate in cases of their inability or of a vacancy. In section 25 surrogates are coupled with justices of the peace and other local judicial officers. Section 27 refers to Surrogates' Courts, and for their relief authorizes the legislature to confer upon courts of record in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates. In no part of the Constitution are surrogates mentioned as judges or justices of any court, and at the time of the adoption of article 6, Surrogates' Courts were not even courts of record, they having been first declared to be such in the Code of 1880.

Reading the clause of section 13, which imposes the disqualification by reason of age in connection with all the other provisions referred to, it seems to us more reasonable to suppose that the people who voted for the adoption of article 6 understood the disqualification as applying to persons who in the Constitution itself were in express terms designated as judges or justices of courts, and were probably known as such and elected by those designations, than to assume that the voters so minutely analyzed the nature of the functions of officers elected under other names, as to discover that some of their duties were of a judicial character, and that therefore they might, though not named as such, be construed to be judges. In interpreting constitutions regard must be paid to the popular sense in which words are generally used. *People v. Good-*

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win, 50 Barb. 562; *Comm. v. Dallas*, 4 Dall. 229; *Gibbons v. Ogden*, 9 Wheat. 188; *Settle v. Van Evrea*, 49 N. Y. 280.

The constitutional provision in question is quite clear and intelligible as applicable to persons popularly known as judges or justices of courts, and named as such in the Constitution itself, but we think it would be unwarrantable to extend it by construction to every officer exercising judicial powers, though not commonly known as a judge or justice of a court, but elected by a different title. The legislature of 1870, which immediately followed the adoption by the people of the judiciary article (art. 6) clearly indicated its understanding of the disqualification in accordance with the views above expressed. The act of 1870 (chap. 86) was passed for the purpose of carrying into effect the provisions of the judiciary article, and section 8 of that act required all the judges and justices of the courts named in article 6, viz., the judges of the Court of Appeals, the justices of the Supreme Court, the judges of the Court of Common Pleas and of the Superior Courts of the cities of New York and Buffalo and of the City Court of Brooklyn and judges of County Courts, to file in the office of the secretary of State a certificate of their age, for the purpose undoubtedly of showing whether they would be disqualified by age from holding their offices before the expiration of the term for which they were elected. It will be observed that there was no provision requiring surrogates or justices of the peace to file any such certificate, clearly indicating that in the judgment of the legislature the disqualification did not apply to those officers. This legislative action, so closely following the adoption of the constitutional provision, is entitled to great consideration by the court in construing the provision. MARSHALL, O. J., in *Cohens v. Virginia*, 6 Wheat. 420; MARCY, J., in *People v. Green*, 3 Wend. 274; CHURCH, C. J., in *People v. Brundage*, 78 N. Y. 403.

Our conclusion is that the office of surrogate of Westchester county will not become vacant on the 31st of December next by reason of the present incumbent, Surrogate Coffin, having attained the age of seventy years in July last, and that the secretary of State was right in refusing to give notice of the election of a successor.

The orders of the Special and General Terms should therefore be reversed and the motion for a *mandamus* denied, with costs.

Ordered accordingly.

All concur.

VAN HORNE V. CAMPBELL.

(100 N. Y. 287.)

Will — executory devise limited after fee.

F. died in 1791, leaving a will devising lands to his wife for life, with remainder to his son D., his heirs and assigns forever. He devised other lands to his son H. The will subsequently provided if either of his sons should die "seised of the estate hereinbefore bequeathed," or any part thereof, without lawful issue, that then the estate of him so dying seised hereby bequeathed shall descend to the other." The widow having died, D. took possession, and died intestate, without issue, and in possession. *Held*, that at common law D. had an absolute power of disposition, the limitation over was void, and D. took absolute title.

EJECTMENT. The plaintiff had judgment, which was reversed at General Term.

Amasa J. Parker, for appellant.

Horace E. Smith, for respondent.

ANDREWS, J. The original plaintiff, Jane Van Horne, claimed title to the premises in controversy, under Henry V. Fonda, one of the sons of Jellis Fonda, who died seised of the premises in 1791, leaving a widow and two sons and three daughters surviving him. The title of Henry V. Fonda depended upon the validity of a devise over in the will of Jellis Fonda. Jellis Fonda in his will devised a parcel of land containing about fourteen acres, including the lot in question, to his wife Jannettie for life, remainder to his son Douw, his heirs and assigns forever. He devised another parcel, under a similar limitation, to his son Henry V. In a subsequent clause of the will it was provided that, "if either of my two sons shall die seized of the estate hereinbefore bequeathed, or any part thereof, without lawful issue, that then the estate of him so dying seized, hereby bequeathed, shall descend to the other of my sons, in which case the survivor shall pay to my said three daughters, each the sum of \$100." Jannettie, the widow of the testator, died soon after her husband and prior to the year 1800. Douw Fonda, after the death of the testator, entered into possession of the fourteen acres devised to him and died intestate in 1837 without issue,

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and without having conveyed or otherwise disposed of the land. The contingencies thereby happened upon which, by the terms of the will, the limitation over to his brother Henry V. was to take effect. The question is, whether this ulterior limitation was valid and vested the fee of the fourteen acres devised in the first instance to Douw Fonda, in his brother Henry, upon the happening of the contingencies specified. If the limitation was valid, the plaintiff is entitled to recover, if invalid, he has no title and cannot maintain the action.

Before proceeding to examine the authorities bearing upon the question, it is important to observe the terms of the devise, and the character of the contingencies upon which the limitation over is made to depend. The devise to the testator's son Douw in the first instance was of a remainder in fee, dependent upon the life estate of the mother. The devise was to him and his heirs and assigns forever—words apt and sufficient to carry an absolute fee. The devise over was upon a double contingency, the death of Douw without issue and without having disposed of the property in his lifetime. The latter contingency is not stated in express words. But the power of the primary devisee to dispose of the land by a conveyance taking effect in his life-time, and thereby defeat the ulterior limitation, is implied from the words limiting the gift over to the land or such part thereof as the primary devisee "shall die seised of." That these and similar words import an absolute power of disposition in the first-taker has been frequently adjudged, and some of the cases on this point will hereafter be referred to. The devise may therefore be described in general terms as a devise to the testator's son Douw in words importing an absolute fee, with superadded words conferring an absolute beneficial power of disposition of the whole subject of the devise by conveyance executed in his life-time and a limitation over in the event of his dying without issue and without having exercised the power of alienation. If the devise in question was a simple devise to the testator's son Douw, in words importing a fee, and a devise over to his brother Henry in the event of the death of Douw without issue at his death, it would have constituted a valid executory devise according to the doctrine finally settled by the Court of King's Bench in *Pells v. Brown*, Cro. Jac. 590, decided in 1619, and which has been uniformly followed in subsequent cases. In that case, as the will was construed, lands were devised to A. and his heirs, and if he died

without issue living at his death, then to B. The devise to A. was in words importing a fee simple, and according to the rule of the common law prevailing in respect to conveyances *inter vivos*, no further limitation was permitted. The common law did not allow a remainder or other legal estate to be limited after a fee. The rule was founded upon the postulate that a conveyance of a fee was a conveyance of the whole estate, and that nothing was left upon which the limitation over could operate. Upon the assumption that a fee given in the first instance carried the entire and absolute interest in the land to the grantee, the common-law rule that there could be no further limitation was logical and consistent, because where the whole is given there can be nothing beyond that left to give. But under the statute of uses, and indeed before they were legalized by that statute, a species of limitations known as shifting or springing uses had been recognized, which permitted ulterior estates to be created to arise upon the defeasance of prior estates in the same property, contrary to the strict rules of the common law. The courts after the passage of the statute of wills (32 Hen. VIII), following the analogies furnished in conveyances to uses, and in support of the intention of the testator, gradually came to recognize the validity of limitations not permitted in conveyances at common law. In this desire to sustain the intention of a testator originated the species of property limitations known as executory devises. There are traces of the doctrine that a fee limited after a fee may be good by way of executory devise, prior to the case of *Pells v. Brown*. But that case completely established the validity and indestructibility of that species of limitations, and it has ever since, as stated by Lord KENYON in *Porter v. Bradley*, 3 T. R. 145, been regarded as the "foundation, and as it were, *magna charta* of this branch of the law." Since that time, executory devises limiting a fee after a fee upon some contingency operating to defeat the estate of the first taker, as upon his death without issue or other specified event, have become common forms of assurance. The common-law doctrine of repugnancy between the two estates, which, as has been said, was perfectly rational upon the assumption upon which it proceeded, has given way to the more just and reasonable view, which regards the prior gift, although made in words, which standing alone, import an absolute estate, as restrained by the subsequent limitation, and as conferring only a qualified estate. This prior estate, although properly denominated

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a fee, because it may last forever, is nevertheless a base or determinable fee, because it is liable to be defeated by the happening of the contingency upon which it is limited. In other words, in such a case, as the limitation is construed, an absolute fee is not given to the first taker, but only a qualified or determinable one. But a reference to the devise contained in the will of Jellis Fonda discloses an element not contained in the will under consideration in: *Pells v. Brown*. It is not a simple devise as in that case, to A. and his heirs, with a devise over on the death of A. without issue, but there is interposed between the primary and secondary limitation, a disposing power whereby the first taker was entitled to dispose of the whole fee for his own benefit, and thereby cut off and defeat the ulterior limitation; because it is evident that the testator in conferring this power on his son Douw was not providing for a disposition by him subject to the limitation over to Henry, but for a disposition which would defeat and destroy it. It is hardly necessary to call attention to the radical difference in the situation of the ulterior devisee, effected by this power of disposition in the first taker, from the situation of the executory devisee in *Pells v. Brown*, and similar cases. In cases of the latter class the right of the ulterior devisee cannot be cut off or divested by any act of the primary devisee. It is true that the secondary limitation depends upon a contingency which may never happen, and so no estate may even vest thereunder; but whether it shall or shall not is not subject to the will of the first taker, but depends upon the event of life or death or other contingency, not within his volition or control. On the other hand, where, as in the will in question, in addition to words importing an absolute fee in the first taker, there is super-added a beneficial disposing power, authorizing him to convey an absolute fee, and thereby divest all rights in the secondary devisee, and cut off the limitation over, the interest of the ulterior devisee, assuming that the limitation is valid, is reduced to scarcely more than a mere possibility. The power given to the first taker is conjoined with an interest in him to exercise the power and thereby defeat the subsequent estate. In any view the estate of the first taker is scarcely less than complete ownership, and the right of the ulterior devisee is, as has been said, scarcely more than a very remote possibility.

The precise question presented therefore for our determination is whether an executory devise can be made to depend on the non-

execution by the first taker of an absolute beneficial disposing power, vested in him by the will creating the limitation, or in other words, whether there can be a valid executory devise where the executory limitation is conjoined with an absolute power in the primary devisee to defeat and cut off the future estate or interest by alienation of the entire fee in his life-time, and whether it makes any difference as to the rights of the ulterior devisee, whether the power has or has not been exercised. This question we may reasonably expect to find answered by the authorities, and as we understand them, it is answered by an unbroken line of authorities in this State, and almost uniform course of decision elsewhere, against the validity of such a limitation. If the limitation over was void, the absolute fee to the fourteen acres vested, on the death of the testator, in his son Douw. Where a limitation over after a devise of a fee-simple is void for remoteness or other reason, the fee-simple stands as an absolute fee, as though no limitation over had been attempted. Lewis on Perp. 657; 2 Washb. Real Prop. 360, and cases cited. Another remark may properly be made before proceeding to examine the authorities. Executory devises are what the courts have made them, and whether in a given case there is or is not a good executory devise depends upon whether the devise conforms to the rules which the courts have adopted regulating that species of limitation. This is very clearly brought out in a striking passage from Mr. Hargrave. Harg. Jurid. Arg., 31: "Executory devises," says that eminent authority, "appear to be not a genuine branch of our law, but an indulged superinduction to it; not a regular production of our general system, but an excrescence; not a strictly regular species of entail, but a permitted regular mode of settlement; not a legitimate offspring of our common law, but a privilege gradually insinuated into our jurisprudence." The general rule sustains a limitation over after the devise of a fee, on a contingency defeating the prior estate; but if it shall be found that the law of executory devises, as established by the courts, does not permit such a limitation over on a particular contingency, as for example where an absolute power of disposition is vested in the first taker, then the limitation over in that case is not a good executory devise, because it does not come within the rules regulating that species of limitation. The limitation over in the case supposed would be repugnant to the prior fee and the superadded power, not because there could not in the nature of things be a complete and perfect

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execution of the intention of testator, for manifestly there is no necessary repugnancy, in fact, between a gift to A. with power of disposition, and a gift over to B. in case the power is not exercised. But such a gift over, upon the assumption made, is repugnant in law to the prior estate and power, because the law has declared that a valid limitation over cannot be made to depend upon such a contingency. The law in the case supposed defeats the intention of the testator. But this occurs in all cases where a testator undertakes to do what the law does not permit. The rule of perpetuities and our statute of uses and trusts furnish familiar examples. Lord LANGDALE, referring to this principle in *Byng v. Lord Strafford*, 5 Beav. 558, said: "The words are not rejected against the rule that every word in a will, shall if possible have a meaning, but because the testator has attempted to do what the law will not permit, or has made dispositions of property which are inconsistent with each other."

The earliest case in the courts of this State, involving the question now presented, is *Jackson v. Bull*, 10 Johns. 19; s. c., 6 Am. Dec. 321, decided in 1813. The action was ejectment. The plaintiff claimed title under the will of one Bull, whereby the testator devised the demanded premises to his son Moses, his heirs and assigns forever, and another parcel, by a similar devise, to his son Young, and then declared as follows: "In case my son Moses should die without lawful issue, the said property he died possessed of I will to my son Young," etc. After the death of the testator, Moses, the son, entered into possession of the property devised to him, and died in possession without issue, and by his last will devised the property to his wife, sister and half-brother, under whom the plaintiff claimed title. The question was whether the testator's son Moses took under the devise an absolute fee, thereby rendering the limitation over void. The cause was tried before Chief Justice KENT, and a verdict was taken subject to the opinion of the court. The court in *banc*, in a *per curiam* opinion in which all the judges concurred, held that the limitation over was void as being repugnant to the absolute ownership and power of disposition given to Moses by the will, and it was declared to be a settled principle that a "valid executory devise of real or personal property cannot be defeated at the will and pleasure of the first taker;" and also that the question did not turn upon the fact whether the devisee had exercised the power of alienation. The power of disposition in the testator's

son Moses was implied from the words "died possessed of." The fact that Moses had himself devised the property was not referred to by the court, and was clearly immaterial. The language from which the power of disposition was implied manifestly confined the disposition to a conveyance by Moses operating in his life-time. He would die possessed of the land in absence of such a conveyance, notwithstanding he had devised it, and if the limitation over was valid, it would not be defeated by a testamentary disposition, because such a disposition was not within the power. The very close correspondence between the circumstances of that case and the one now before us cannot fail to attract attention. In both the primary devise was in words appropriate to carry a fee; the limitation over in both cases was on a double contingency of precisely the same character, that is on the contingency of death without issue and without having disposed of the property, and in neither had the power of disposition been exercised. The case of *Jackson v. Bull* is a direct and explicit authority against the validity of the limitation over in the case before us. The next case involving the question arose upon the will of William Alexander, known as Lord STERLING, who died in 1783. By his will, dated in 1771, he devised in words sufficient to carry the absolute property, all his estate, real and personal, to his wife Sarah; but in case of her death without disposing of such estate by will or otherwise, then all such estate, or all parts thereof as should remain unsold or undevised at her death he devised to his daughter, Catherine Duer. This it will be observed was a perfectly valid executory devise to Catherine unless the limitation over was void by reason of the disposing power vested in the mother. Several cases are reported in Johnson, arising under this will. But the case of *Jackson v. Robins*, 15 Johns. 169; s. c., 16 Johns. 537, is the only one to which reference need be made. That was ejectment brought to recover lands in Ulster county, the plaintiff claiming title under the limitation over to Catherine, the daughter of Lord Sterling. The defendant relied upon two principal grounds of defense: first, that the limitation over in the will over the will of Lord Sterling was void, by reason of the power of disposition given to the mother; and second, a title by adverse possession. The case came before the Supreme Court on special verdict, and judgment was rendered for the defendant. It was carried to the Court of Errors and was there argued by some of the most eminent counsel in the State. The opinion was delivered by

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Chancellor KENT, adversely to the plaintiff, sustaining the defense on both grounds. The counsel for the plaintiff at great length and with great ability assailed the correctness of the decision in *Jackson v. Bull*. The chancellor in his opinion re-examined the principles of that decision, and after an elaborate discussion and examination of the authorities, reaffirmed the doctrine of that case and declared that "there is not a case to be found in which a valid executory devise was held to subsist under an absolute power of alienation in the first taker." The court concurred unanimously in the opinion of the chancellor, and the judgment was affirmed. Passing by the case of *Patterson v. Ellis*, 11 Wend. 260, as not material to the discussion, except that Chief Justice SAVAGE in his opinion cites and expressly approves the doctrine of *Jackson v. Bull*, we come next in order to the case of *Helmer v. Shoemaker*, 22 Wend. 137. The plaintiff claimed certain land under an executory devise, the defendant under the first taker. By the will the land was devised to the testator's wife without words of limitation, and it was then declared that "all the avails of the property that might remain" at her decease should go over. It was held, COWEN, J., writing the opinion, that the widow took an absolute fee by reason of the power of disposition. The title of the defendant might perhaps have been sustained on the deed from the widow, as an execution of the power, but no reference was made to this point, and the court disposed of the case on the doctrine of *Jackson v. Bull*. In *McDonald v. Walgrove*, 1 Sandf. Chy. 274, a testator devised all his real estate to his wife to be at her entire disposal; but if any part remained unsold at her death, he devised the same to his children and grandchildren. The will took effect before the Revised Statutes, and the widow died without having sold the property. It was held by the vice-chancellor that the wife took an absolute fee and that the subsequent limitation was repugnant and void. The learned judge touches very nearly the marrow of the question when he says: "Here the whole estate was made defeasible by the disposition of the property of the testator, and by consequence it cannot be deemed an executory devise." *Norris v. Beye*, 13 N. Y. 273, was a case involving the construction of a will of personal estate taking effect after the Revised Statutes. The testator, after bequeathing a personal fund in language denoting an absolute gift, provided that it should go over in the event of the first legatee dying under age and without issue. It was held in accordance with

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the settled law that the gift over was a valid executory bequest. Judge DENIO, delivering the opinion of the court, distinguished the case from those in which the limitation over was preceded by an absolute power of disposition in the first taker, and said: "In such cases a further limitation was clearly hostile to the nature and intention of the gift." No reference was made by the learned judge to the provisions of the Revised Statutes, but the case was decided on common-law principles. The case of *Trustees, etc., v. Kellogg*, 16 N. Y. 83, involved the validity of a legacy under a will which took effect in 1824. The testator devised his real and personal estate to his daughter Chloe, her heirs and assigns forever, and in the event of her dying without issue, he gave to the plaintiff a legacy of \$10,000. The testator by his will appointed a guardian for the daughter during her minority, and directed him to apply such part of the estate as he should deem necessary for her maintenance, education and support. It was claimed on behalf of the executors that the legacy was void for repugnancy to the prior gift to the daughter. The objection was overruled on the ground that the power of disposition was limited to a special purpose, and during a limited period, viz., for the maintenance, education and support of the daughter during her minority, and also that from the amount of the estate, the provision for the support of the daughter could not have been intended to interfere with the legacy to the plaintiff. Judge DENIO in his opinion recognizes the rule that an absolute power of disposition would have rendered the legacy void. He says: "If it appeared that the testator intended to confer upon the first devisee an absolute power of disposition, and in his will he afterward made a gift over, the two dispositions cannot stand together. The absolute power of disposition shows that he intended to give an unqualified title to the first devisee, and it is in the nature of such a title that the property, if not alienated by the owner, shall descend to the heirs if it be real estate, or go to the next of kin if it be personal. The gift over is repugnant to this quality of absolute ownership, and it is consequently void." It will be noticed that Judge DENIO regarded the rule stated as alike applicable to devises of real and personal property. *Tyson v. Blake*, 22 N. Y. 563, was the cause of an executory bequest with a limitation over on the death of the primary legatee without issue, and is only important in the discussion as containing an express recognition of the doctrine of the prior cases, that

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a limitation over is incompatible with an absolute disposing power in the first taker. *Terry v. Wiggins*, 47 N. Y. 512, was an action of ejectment, the title depending upon a devise in a will which took effect in 1862, of certain land to the testator's wife, for "her own personal and independent use and maintenance," with power to sell the same, and a devise over after her death, of any residue, etc. The court construed the will as giving the wife a life estate only, with a limited power of disposition, and sustained the devise over on this ground. ALLEN, J., said: "The power of disposition is not absolute, so as to bring it within the rule making all devises with absolute power of disposition in the devisee, gifts in fee;" and he further said that if the devise to the wife had been a fee, the claim that the devise over was repugnant and void would have been well founded. The learned judge also referred to certain provisions of the Revised Statutes, and remarked that it was not material to decide whether the limitation over was a good executory devise at common law. *Smith v. Van Ostrand*, 64 N. Y. 278, involved the construction of a will which as construed gave to the testator's widow a sum of money during life or widowhood, with power to use so much of the principal as might be necessary for her support, with remainder to her children. The court sustained the validity of the gift in remainder, on the ground that the power of disposition was not absolute, but limited and conditional. Judge RAPALLO said: "The cases sustain the proposition that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy," and adds: "But they also recognize the principle that if the *jus disponendi* is conditional, the remainder is not repugnant. The power of disposition in the present case is only for a special purpose — the support of the widow." *Campbell v. Beaumont*, 91 N. Y. 464, was an action for the construction of a will of real and personal estate, which took effect in 1876. The principal question was whether there was a valid limitation over of the real and personal estate, which in the first instance was given to the wife of the testator. The alleged limitation over was of the property, or such portion "as may remain," etc., after the decease of the wife. The court held that upon the construction of the whole will the fee in the real estate and the absolute interest in the personal property was given to the wife, and further, that if the intention of the testator was to limit the estate over, the limitation was void as repugnant to the power of disposition. DAN-

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FORTH, J., said: "The gift appears absolute and entire in its terms; no child of the testator was to be provided for, and it better accords with decisions in this State to hold that if a limitation over was attempted, it is repugnant and void," citing *Jackson v. Bull, supra*.

We have referred to all the cases which we have found in this State having a direct bearing upon the point under discussion. They unite in declaring as an undoubted principle of the common law that a valid executory devise cannot co-exist with a devise of a primary fee, accompanied with an absolute disposing power in the first taker, and that an executory limitation by will, either of real or personal property after a gift of an absolute estate, is void. An absolute power of disposition annexed to a primary devise in fee is deemed conclusive of the existence in the primary devisee of an absolute estate. Such of the cases as sustain a limitation over after a life estate, accompanied with a limited power of disposition in the life tenant, proceed upon a distinction perfectly well settled, and fall within that common form of limitation, viz., a limitation for life, with power of appointment in the life tenant, and remainder over on default of its exercise. The estate created by the exercise of the power does not take effect out of the interest of the life tenant, but out of the estate of the grantor of the power not embraced in the life interest. See *Bradley v. Westcott*, 13 Ves. 445.

The decisions in other States upon this question are equally uniform. *Idc v. Idc*, 5 Mass. 500, decided in 1809 by Chief Justice PARSONS, is perhaps the earliest case in the country upon the subject. The action was ejectment. In that case the testator devised real estate to his son P., his heirs and assigns forever, and also bequeathed to him personal estate in words denoting an absolute interest, and in a subsequent clause declared, "and further, it is my will that if my son P. shall die and leave no lawful issue, what estate he shall leave, to be divided between my son J. and my grandson N.," etc. P. conveyed the land in his life-time and died leaving no issue. The court held that the limitation over was void for repugnancy to the disposing power, and on that ground decided the case for the plaintiff, making no reference to the fact that P. had exercised the power by a conveyance. The power of disposition was held to be implied from the words, "what estate he shall leave." *Melson v. Doe*, 4 Leigh, 408, decided by the Supreme Court of Virginia in 1833, was a case where a testator devised land to his son W. and his heirs, and if he should die without a

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son, and not sell the land, then to the testator's son G. It was held, as stated in the head-note, that the devise gave W. absolute power to sell a fee-simple and therefore whether he sold or not, he took a fee-simple and the devise over was void. The same principle was declared in a prior case in the same State (*Riddick v. Co-hoon*, 4 Rand. 547), where the power of disposition was held to be implied from the words, "so much of the estate as may remain undisposed of." *Cook v. Walker*, 15 Ga. 459, involved the construction of a marriage settlement of real and personal property which provided for the devolution of the property if the wife "should die intestate, without making any disposition," etc. LUMPKIN, J., in delivering the opinion of the court, said: "We hold it to be an incontrovertible rule that whenever an estate is given in Georgia, either by deed or will, to a person generally or indefinitely, with an unlimited power of disposition annexed, it invariably vests an absolute fee in the first taker, and that neither a remainder nor an executory devise can be limited on such an estate." The cases of *Flinn v. Davis*, 18 Ala. 132, and *McRea's Administrators v. Means*, 24 Ala. 350, declare the same rule. In *Pickering v. Langdon*, 22 Me. 413, it was declared that a gift over of real and personal estate of "what remains" on the death of the first taker, was void; and in *Ramsdell v. Ramsdell*, 21 Me. 288, it was declared that the doctrine of *Jackson v. Bull*, *supra*, was the settled law. The doctrine that an absolute power of disposition in the first taker was fatal to a limitation over was also declared by the court of North Carolina, 1 Jones, 463, and also by the courts of Tennessee in two cases, *Williams v. Jones*, 2 Swan. 620, and *Davis v. Richardson*, 10 Yerg. 290; s. c., 31 Am. Dec. 581. After a somewhat diligent examination I have been unable to find any decision in any court in this country adverse to the doctrine declared in *Jackson v. Bull*, *supra*, and I think it may safely be affirmed that the doctrine of that case is the settled law of the American courts. I cannot better conclude this review of the American cases than by quoting the words of Chancellor KENT in his Commentaries, written long after the decisions in *Johnson*, *supra*, and after the close of his judicial life. Speaking of executory devises (4 Kent Com. 270), after stating that a valid executory devise must be indestructible by the first devisee or taker, he adds: "If therefore there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee, and if he dies possessed of the

property without lawful issue, the remainder over, or remainder over of the property which he dying without heirs should leave, or without selling or devising the same; in all such cases the remainder over is void as a remainder because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will." See also to the same effect, 2 Wash. Real Prop. 669.

The doctrine of *Jackson v. Bull* is assailed as contrary to the settled rule of the English courts, and as based upon a misconception of the case of *Attorney-General v. Hall*, Fitzg. 314, cited as authority for the decision, and upon a mistake of the court in applying to executory devises a rule applicable only to limitations of personal property. If the claim made was well founded, it would furnish no reason for departing from a rule of property settled by repeated decisions in our courts, and which has become the foundation of legal titles. Many of the established rules of property limitation are technical and in many instances were founded upon mistaken analogies or upon reasons which no longer have any significance. But to depart from them in cases where rights have become vested and titles have been taken in reliance upon them, would produce great inconvenience, and in many cases work gross injustice. But after an examination of the English cases I have reached the conclusion that the doctrine of *Jackson v. Bull* accords with the great weight of authority in England, and that the alleged distinction between executory testamentary limitations of real and personal estate has no foundation in English law, or at least that such a distinction has not been recognized from a time anterior to the case in *Fitzgibbon* which was decided in 1731. In that case a testator owning real and personal estate gave it by will to his son F. H., and to the heirs of his body, and if he should die leaving no heirs then he gave so much of the real and personal estate as the son should be possessed of at his death to charitable purposes. The question was whether the limitation over of the personal property was good. The court, as the case states, "unanimously held that the absolute ownership had been given to F. H., for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent, and therefore he had power to dispose of the whole," and the limitation over was held to be void. The case was referred to and approved by Lord HARD-

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WICK in *Flanders v. Clark*, 1 Ves. Sr. 9, who said: "It was insisted in *Attorney-General v. Hall*, Fitzg., that he, F. H., had only a usufructuary interest, and so to go over, but it was determined by Lord KING that he had the absolute property, and therefore the devise was void, for he had the power to spend the whole, which was an absolute gift." It will be noticed that Lord HARDWICK understood the case as holding that the gift was absolute, because of the power of disposition. It accords with logic as well as law, that where a gift of real or personal property is in law absolute there can be no valid ulterior limitation engrafted upon it. Executory devises of a fee limited after a fee were sustained, as I have said, upon the ground, that construing the whole limitation together, the first fee was a qualified and not an absolute interest.

In the early period of the law, as is well known, future estates in personal property were not permitted. It was originally held that a gift of personalty for life was an absolute gift, so as to invalidate any further limitations, 7 Roll. Abr. 610; then a distinction was raised between the gift of the thing itself, and a bequest for the use only for life, Plowd. 521; Cro. Jac. 346, but this distinction was finally laid in *Hyde v. Parrat*, 1 P. Wms. 2, and for more than a century and a half, executory bequests of personal property have been permitted by the law of England, under the same rules of limitation as apply to executory devises of land. It will avoid confusion to refer to one distinction between limitations of real and personal property, founded upon a peculiar reason, and which is an exception to the general rule of uniformity of construction. It was settled at a very early period in the law that words of limitation that give an estate tail in land give an absolute interest in personal property. This distinction was indulged in order to prevent the creation of perpetuities in limitations of personal property. The statute *de donis*, which was the foundation of estates tail, applied only to land. In their origin these estates were perpetuities, because they could not be alienated out of line of the entail. The courts, to defeat the design of the great lords in enacting the statute, invented the processes of fines and common recoveries as a means of unfettering these entails. But limitations of personal property in the nature of estates tail in land could not be barred by fine or common recovery, and unless cut off and held to be invalid, would lead to perpetuities in that species of property. And to prevent this, the limitation to issue was held to be void, and the first taker was

held to take an absolute interest, free from the limitation over. *Bradhurst v. Bradhurst*, 1 Paige, 331-345; Roper Leg., p. 1522. Executory devises were also exempt from the operation of fines and common recoveries, because the fiction of compensation to the issue in tail, upon which those proceedings were founded, was inapplicable to that species of limitation; but they were prevented from becoming perpetuities by the rule established by the courts, that in order to be valid, they must be limited on a contingency which must happen within the period prescribed for the vesting of future estates. The doctrine of executory devises in its origin had reference to real property; but from a very early period in the law, and prior to the case in *Fitzgibbon* (*supra*), executory bequests of a future interest in personal property, to take effect on a contingency defeating a prior bequest, made in words denoting a gift of an absolute estate in the first taker, were recognized as valid, and I am unable to find any trace in recent times of any distinction between the two species of limitation, or any case which holds that a limitation bad as to one species of property is good as to the other, or conversely. The very early case reported in 2 Freeman's Ch. 137, decided in 1672, expressly affirmed the validity of an executory bequest of personal property after words of absolute gift, to take effect on a contingency defeating the prior estate. The case was a bequest of £500 to the testator's daughter, and if she died under thirty years of age, unmarried, then over. She received the money and died before the time; it was held that her executors were chargeable as possessed in trust for the legatees over. This indeed says Fearne (p. 404), was not the case of a devise to one for life or a particular period, and afterward to another, but a conditional new disposition of the property upon a particular contingency. There are many other English cases sustaining an executory bequest of the same character. *Atkinson v. Hutchinson*, 3 P. Wms. 258; *Wilkinson v. South*, 7 T. R. 555; *Stone v. Maule*, 2 Sim. 490. The doctrine that personalty may be bequeathed under the same limitations as realty, and that the validity of executory bequests depends upon the same rules as govern executory devises, is affirmed by the text-writers, and so far as I know, without dissent. Lewis Perp. 99; Smith Exec. Int. 312; Roper Leg. 1546; Fearne Rem., Mr. Butler's note E, p. 401. Upon the authorities the claim that the case in *Fitzgibbon* proceeded upon any distinction known to the law between an absolute bequest of personal property with a superadded power of disposition in the

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first taker, and an executory devise of the same character, cannot be supported. The rule that a gift over of personal property by will, after a prior general gift accompanied with an absolute disposing power in the first taker, is void for repugnancy, was held in *Bull v. Kingston*, 1 Mer. 314 and in *Ross v. Ross*, 1 Jac. & W. 154. They go upon the general principle and not upon any distinction between real and personal property. The case last cited was of a legacy to A., to be paid at twenty-five, with a limitation over if A. should not receive or dispose of it by will in his life-time, and the limitation over was held to be void for repugnancy. Sir THOMAS PLUMER, M. R., said: "I do not recollect any instance of a will where an absolute property is first given, with a condition that if a party does not make use of it, it goes over," and referring to the case before him, he said: "It is quite a novel attempt to separate the devolution of property from the property itself."

There is a single case in England which sustains the contention of the plaintiff. In *Doe v. Glover*, 1 M., G. & S. 448, decided in 1845, a testator devised lands to his son, his heirs and assigns, forever, but in case his son "should depart this life without leaving any issue of his body then living," and shall not have "disposed of or parted with his interest in said lands," then over. The son died without issue and without having disposed of the land in his life-time, but left a will devising the property. The question considered in the opinion was whether the will was a good disposition of the disposing power. The court decided that it was not, and having reached this conclusion, held that the limitation over took effect, without adverting to the question whether there was any repugnancy between the limitation over and the disposing power. In *Beachcroft v. Broome*, 4 T. R. 441, is a dictum by Lord KENYON, also supporting the plaintiff's position. The case of *Doe v. Glover* is the only case in England which we have been able to find involving the question, which sustains a limitation over after a devise in fee accompanied with an absolute power of disposition in the primary devisee. But as early as 1746, in the case of *Gulliver v. Vaux*, a report of which was found among Sergeant Hill's manuscripts, and which is printed in an appendix to the case of *Holmes v. Godson*, 8 De G., Mac. & G. 152, it was held that a limitation over of real estate after a fee, on the contingency of the death of the first taker without issue and "without appointing the disposition of the estate," was not a good executory devise by reason of its repugnancy to the

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disposing power. The case was decided by WILLIS, C. J., and his associates, and is declared by Lord Justice TURNER, in *Holmes v. Godson*, to be of the highest authority. The case of *Holmes v. Godson*, which was decided on appeal in chancery in 1856, is a precise authority in support of the doctrine of *Jackson v. Bull*, *supra*. That was the case of a devise of real and personal estate in trust for the testator's son, with a proviso that if he should die under twenty-one, or without having made a will, then over. The plaintiffs claimed under a conveyance of the real estate from the son, and the defendants under the limitation over, the son having died after he had attained the age of twenty-one without making a will. The court held that the limitation over was void for repugnancy, Lord Justice TURNER saying: "This is in terms a disposition of real estate in favor of other devisees, in the event of the primary devisee dying intestate, and I think such a disposition is repugnant and void." After referring to decisions relating to personal property, he said: "It was objected to these cases that they all referred to personal estate. But upon this question I confess myself unable to see the distinction between cases relating to personal property and cases relating to real estate," and then, after referring to *Gulliver v. Vaux* and other cases, he continued: "All these are cases of real estate, and they seem clearly to prove that upon this point there is no distinction between the cases relating to real and personal estate. In truth, the decisions in both cases turn, as I apprehended, on this: The law has said that if a man dies intestate, the real estate shall go to the heir, and the personal estate to the next of kin, and any disposition which tends to contravene that disposition which the law would make is against the policy of the law, and therefore void." And then referring to *Doe v. Glover*, *supra*, and to the fact that the point of repugnancy was not brought to the attention of the court, he said: "If the case of *Doe v. Glover* is to be considered as conflicting with the other authorities, I think that the other authorities, and especially the case of *Gulliver v. Vaux*, ought to prevail against it." Lord Justice BRUCE also delivered an opinion to the same effect. The case *In re Stringer, etc.*, 6 Ch. Div. 1; s. c., 22 Moak's Eng. Rep. 602, arose upon a will in which the testator gave to J. his real and personal estate, with full power to sell and dispose thereof, by deed or will, with a gift over in case J. should make no disposition of the property. J. died in the life-time of the testator. It was held at the hearing, by Sir GEORGE JESSEL, M. R.,

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that the gift over was void for repugnancy. The decision was reversed on appeal on two grounds: First, that as the first gift failed by the death of the primary devisee before the death of the testator, the second devise took effect as a primary limitation; and second, that on the whole will, the intention was that the testator should have only a life estate. But the judges expressly recognize and affirm the doctrine that a limitation over, after a fee with an absolute power of disposition in the first taker, would be void. JAMES, L. J., said: "It is settled by authority that if you give a man some property, real or personal, to be his own absolutely, that you cannot by your will dispose of that property which becomes his. You cannot say that if he does not spend it, or if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket, at the time of his death, shall not go to his heirs at law if it be realty, or to his next of kin if it be personalty." See also *Shaw v. Ford*, 7 Ch. Div. 669; s. c., 23 Moak's Eng. Rep. 796.

The authorities cited sustain, I think, the main proposition of this opinion, that according to the uniform course of decision in this country and the great weight of authority in England, a valid executory devise cannot at common law be limited after a fee upon the contingency of the non-execution of an absolute disposing power vested in the first taker, and that such a limitation over is void in its creation. I have not referred to the provisions of the Revised Statutes. If these provisions (1 R. S. 725, §§ 32, 33) have changed the common law, a point which we do not now decide, they cannot affect the disposition of this case. The rights under the will of Jellis Fonda became fixed upon his death in 1791, and must be adjudged according to the rules of the common law.

I have considered the case upon the assumption that the right of the plaintiff rested solely upon the will of Jellis Fonda, and have made no reference to the claim made on the argument, so far as appears, for the first time, that admitting that the testator's son Douw took an absolute fee in the fourteen acres under the will, yet upon his death his brother Henry took an interest in the land as one of his heirs-at-law, which became vested in his children upon his death. It is unnecessary to consider this aspect of the case, as the defendant, if the order of the General Term is affirmed, is entitled to judgment absolute upon the plaintiff's stipulation.

I close this too protracted discussion. It may find some excuse

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in the desire to vindicate the doctrine of *Jackson v. Bull*, and the cases in this State which have followed it, from the claim persistently urged, but as I think, without foundation, that that doctrine was a departure from the established law.

The order of the General Term should be affirmed and a judgment absolute directed for the defendant.

Order affirmed.

RUGER, C. J., dissented.

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(100 N. Y. 898.)

Marriage — husband's succession to intestate wife's personality.

When a married woman dies intestate, and without descendants or ancestors, her personal property goes to her husband at common law, and this rule has not been changed by the various modern Married Women's Acts.

ACTION for construction of a will. . The opinion states the case. The defendant had judgment below.

Edward C. James, for appellant.

J. W. Pickett, for respondent.

MILLER, J. The question to be determined in this case is whether John S. McClure, the defendant and executor under the last will and testament of his wife, Caroline McClure, is entitled to that portion of the estate of the testatrix which by her will was bequeathed to her brother, Wright Robins, and which lapsed by reason of his death prior to the death of the testatrix.

The testatrix by her will devised and bequeathed to her husband certain real estate and personal property, and also one half of the residue of her estate, both real and personal, absolutely. The remainder she gave to her brother, Wright Robins, and her sister, Mrs. Elizabeth Carter, to be equally divided between them. She left no descendants or ancestors. The residuary estate consisted solely of personal property. Her husband qualified as executor, and claims to be entitled to that portion of the estate which is lapsed, under the common law, by virtue of his marital rights.

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The plaintiff claims as one of the next of kin and heirs-at-law, being a son of a deceased brother of the testatrix, Isaac Robins, an interest in such unbequeathed personal property, and brings this action on behalf of himself and for the benefit of such next of kin and heir-at-law as will come in and contribute to the expenses thereof.

By the common law the husband became entitled to that portion of his wife's personal property of which she was actually possessed at the time of her marriage, or which came to her during coverture. In case of the wife's death prior to that of her husband he was authorized to take out letters of administration upon her estate and as administrator, after the payment of her debts, if any there were, he retained and became the owner of the assets remaining in his hands as such administrator under the practice then existing, by means of which, before the statute of distributions, the administrator converted and appropriated the assets in his hands to his own use. A contest arose between the ecclesiastical and temporal courts concerning the right of the administrator to thus appropriate the funds, which contest was finally settled by the passage of the statute of distributions (22 Car. II, chap. 10), and as doubt still existed in regard to the rights of the husband, an explanatory act (23 Car. II, chap. 3) was passed, by section 25 of which it was declared that this statute should not be construed to extend to the estates of *femes covert* dying intestate, but that the husband should have the same right to administer and enjoy such estate as before the passage of the said act.

The rule of the common law, which authorized the husband to hold the property of his wife by virtue of administration, has been extended in this State, so as to entitle him to hold the same also by virtue of his marital rights, and numerous cases sustain this doctrine. In the case of *Ransom v. Nichols*, 22 N. Y. 110, it was held that where a married woman possessed of separate personal estate dies without having made any disposition of it in her life-time, or by way of testamentary appointment, the title thereto vests in her surviving husband, and cannot be affected by the granting of administration upon her estate to any other person. In the case cited, letters of administration had been taken out by a third person upon the wife's estate, and an action was brought against the maker of a note to recover the amount of the same, which note was originally given to the deceased wife and afterward renewed payable to the

husband and held by him. It appeared upon the trial that the amount of the note had been settled with the husband and taken up and cancelled. It is said in the opinion: "The property then in this case stands precisely upon the footing of choses in action of the wife, which have not been reduced to possession during the coverture. In this event the husband has the right to recover and enjoy them as his own, either as an incident to the marital relation and as flowing from it, or as an incident to his right of administration upon her estate; and for all practical purposes it is immaterial to which source this right should be referred. This right of administration is secured primarily to the husband by the statute, and indeed according to some authorities, it exists in the husband *jure mariti*, and wholly irrespective of any statutory provisions upon the subject." It will be noticed that the husband did not administer upon the estate of his wife, and hence it was claimed that he had no authority to interfere with her assets or to settle with the defendant who was the maker of the note. The decision expressly overrules this position and upholds his claim by virtue of his marital rights.

In *Ryder v. Hulse*, 24 N. Y. 372, the action was brought for the recovery of certain notes bequeathed by the wife of the plaintiff, who had taken out letters of administration upon her estate, to a third person, which notes had been acquired before the passage of the Married Women's Acts of 1848 and 1849, and it was held that the wife had no power to dispose of said notes by will and that the plaintiff was entitled to recover, and it was laid down in the opinion by WRIGHT, J., that all the personal estate of a wife vests absolutely in the husband at the moment of marriage, and all she acquires during coverture immediately becomes his, and that the same rule applies to choses in action, and as to those she has only a contingent interest; that in the event of the wife's death the husband does not take the choses in action not then reduced to possession by virtue of any statute of distribution or as next of kin, but the property is already vested in him, and if he should die before recovering, then they would be assets of his estate to be recovered by his representatives, and not by the representatives of his wife; that by his wife's death her interest becomes extinct, and his becomes absolute, with the right of possession as administrator. It is further said that the same view of the question was taken in the case of *Ransom v. Nichols*, 22 N. Y. 110, which is commented

upon, and the rights of the husband by virtue of the marital relation fully sustained.

In *Olmsted v. Keyes*, 85 N. Y. 602, the rule laid down in the cases cited is fully upheld. It is said, in the opinion by EARL, J., that "all choses of the wife, not reduced to possession during the joint lives by the common law passed to the husband upon her death. * * * He may then release them or take payment of them without administration, if he can get payment. If administration is needed to reduce the choses to possession he is entitled to it, and if there are no debts the administration is solely for his benefit. If after his wife's death the husband does not release, assign or reduce to possession her choses in action during his life-time, then after his death his personal representatives are entitled to administration upon them for the benefit of his estate as part of his assets." See also *Westervelt v. Gregg*, 12 N. Y. 210; s. c., 62 Am. Dec. 160; 2 Kent Com. 136, 143; Reeve Dom. Rel. (1st ed.) 1. In *Barnes v. Underwood*, 47 N. Y. 351, it is held in the opinion that at common law marriage is an absolute gift to the husband of the goods and chattels and personal property of which the wife is actually possessed and of such as come to her during coverture. As to choses in action marriage is only a qualified gift, conditioned that the husband reduce them to possession during the existence of the marriage relation, and when so recovered the title vests absolutely in him. It is there said that the husband became entitled to the estate of his deceased wife by virtue of the right to administer; that this right did not depend upon a title existing during marriage, but upon that which he acquired upon her death by the exclusive right to administer her estate as her successor.

In that case no notice is taken of the decisions of this court already cited, which had previously been made and in which it was laid down, as we have seen, that the husband at common law became vested with all the personal property of his wife by virtue of the marital relation and not solely as administrator, and as these cases are not considered or discussed in the opinion, and no dissent expressed in reference to the same, the rule therein stated cannot be regarded as overruled or in any way affected or impaired. Until this is done by an authoritative decision of this court, they must stand as the settled law of the State applicable to cases involving the same or any similar question.

We are not referred to any case in the English reports where the

rule of the common law is stated exactly and in the precise form as in *Barnes v. Underwood*, *supra*.

In *Fleet v. Perrins*, which was first reported in L. R., 3 Q. B. 536, and afterward on appeal in L. R., 4 Q. B. 500, it was held that where the defendant received money from a third person, to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal, and the wife died, and then her husband, and the wife's administratrix sued the defendant for money had and received to the use of the wife, the action was rightly brought by the wife's representative, as the facts showed only a chose in action conferred on the wife, with which the husband had not interfered during coverture.

In the case last cited the distinct objection was taken that the action could not be maintained by the plaintiff as administratrix of the wife, on the ground that it was for money received by the defendant for the wife during coverture, and that as her husband survived her, the administratrix of the husband was alone entitled to sue for the recovery of it. The decision in this case sustains the doctrine no doubt that where the husband has not interfered with the choses in action of the wife during her life, the same pass to her next of kin, and that his representatives upon his death, after the death of the wife, have no right thereto as a part of his estate to which he was entitled by virtue of the marital relation.

While it is nowhere laid down in the case last cited that the husband who survives the wife is entitled to her personal estate as administrator and not by virtue of the marital relation, the conclusion arrived at is nevertheless in conflict with the current decisions of the courts of this State, as we have seen, and it should not be followed.

The rule of the common law, as explained by these decisions, was fully recognized by the provisions of the Revised Statutes.

The husband was solely entitled to letters of administration upon his wife's estate, and if he failed to take out letters, he was presumed to have assets in his hands sufficient to pay her debts, and was held liable therefor; and if he died leaving any assets of his wife unadministered, they passed to his executors or administrators as part of his personal estate, but subject to her debts. 2 R. S. 75, § 29. If any one else administered, the husband was entitled to the assets which remained after the payment of debts. 2 R. S. 76, § 30. And it was further provided that the statute of distri-

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bution should not apply to the personal estate of married women, but it was declared that their husbands might demand, recover and enjoy the same as they are entitled by the rules of the common law. 2 R. S. 98, § 79. The enactments referred to remained in force until a new system was inaugurated having in view the protection of the rights of married women, under which material changes were made in the laws in respect to the same as they had previously existed. These laws embrace enactments by the legislature at different times and contained provisions in reference to the separate estates of married women which did not exist at common law or under the statutes of Great Britain or the statutes of this State, as will be seen by a reference to the same.

The first enactment (chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849) declared that the wife's property should not be subject to the disposal of her husband or liable for his debts, but should continue her sole and separate property as if she were a single female, and she was empowered to take and hold property and convey and devise the same as if she were unmarried. By chapter 576, Laws of 1853, the husband was exempted from the payment of his wife's debts contracted before her marriage. By chapter 90, Laws of 1860, and by chapter 172, Laws of 1862, other provisions were made in conformity with the previous enactments, the effect of which was to separate the estate of a married woman from the control of her husband and confer upon her the same rights as if she were unmarried, and relieve the husband from the liability previously existing for the payment of her debts. Then followed chapter 782, Laws of 1867, which contained other provisions of a similar character, and among other things an amendment to section 79 of the Revised Statutes *supra*, by the repeal of its former provisions, and making it read as follows: "§ 79. The preceding provisions respecting the distributions of estates shall apply to the personal estates of married women dying, leaving descendants them surviving; and the husband of any such deceased married woman shall be entitled to the same distributive share in the personal estate of his wife to which a widow is entitled in the personal estate of her husband by the provisions of this chapter, and no more." By section 11 of the same act, section 30 of the Revised Statutes *supra*, was repealed.

In view of the changes thus made, the question arises what effect is to be given to the enactments last named. It is claimed by the

appellant's counsel that the amendment of section 79 and the repeal of section 30 did not leave the common law *in proprio vigore* as the General Term assumes; that they were affirmative of the common law; that where a statute affirmative of the common law is abolished, the common law must likewise be abolished, otherwise the repealing act would be a nullity. These provisions made the following changes: First, that under section 79, instead of the husband being entitled to the whole of the wife's personal estate, he was only entitled by the amendment when the married woman died leaving descendants to the same distributive share as a widow would have in the estate of her deceased husband. Second, by the repeal of section 30, where letters of administration were granted to any other person than the husband, the administrator would be bound in case the person dying left descendants, as provided in section 79, to pay over to the husband only one-third of the personal estate and divide the balance among the descendants. It will be seen that no provision was made for the distribution of the estate where a married woman died without leaving any descendants, and leaving a husband her surviving.

The provisions of the statutes to which we have referred were the subject of consideration in *Barnes v. Underwood*, *supra*, and it was there held that the amendment of the seventy-ninth section of the statute of distribution in 1867 did not affect the right of the husband to administration and enjoyment of his deceased wife's personal estate, except in the case therein specified, of her dying leaving descendants. CHURCH, C. J., after discussing the effect of section 30, says: "It is equally clear that if that section had been originally enacted in the form as amended in 1867, the rights of the husband would not have been affected by it except in the single case therein specified, of the wife dying leaving descendants, and in that case the husband would have been limited to the distribution therein specified; and such is its only effect and operation now. The twenty-ninth section, giving the husband absolute right of administration and enjoyment, remains in full force, except as qualified by the amendment of the seventy-ninth section in 1867; but the qualification has no application unless the wife dies leaving descendants. * * * It is unnecessary to determine the effect of the repeal of the thirtieth section, until a case is presented where the husband does not himself administer upon the estate."

As the testatrix in the case at bar left no descendants, her hus-

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band became entitled to the same interest in her personal property as though the amendment of section 79 and the repeal of section 30 had not been made, either as administrator, if he was authorized to administer upon her effects, or if not, as we have seen, by virtue of his marital rights under the decisions of the courts in this State. That he was unable to administer by reason of his being executor under his wife's will could make no difference, as the law established his rights independent of his right to administer. In either case the property belonged to him, and he could not be deprived of his rights because his wife left a will in which provision was made for him, and he was appointed executor and acts as such and accepts a devise and bequest in his favor under the will.

If the husband had not accepted the appointment of executor under the will and refused to qualify, and if an administrator had been appointed with the will annexed, could it be said that he waived his rights as husband at common law and that the estate thereby passed to the next of kin or heirs at law of the deceased? The amendment of section 79 only affected his interest where the wife died leaving descendants, and under that provision alone it cannot be claimed that the husband would be deprived of his rights at common law, and although the repeal of section 30 left no provision for the payment of assets to the husband by the administrator, as the Married Woman's Acts of 1848 and 1849, as we have seen, and as the authorities hold, *Ransom v. Nichols*, 22 N. Y. 110; *Ryder v. Hulse*, 24 N. Y. 372; *Barnes v. Underwood*, 47 N. Y. 351; *Vallance v. Bausch*, 8 Abb. Pr. 368; *Fry v. Smith*, 10 Abb. N. C. 224; *Gilman v. McArdle*, 12 Abb. N. C. 414, made no change in the common law as to the husband's rights, it is a fair and legitimate inference that the common law remained in force and was applicable in such a case. The repeal of section 30 was essential to give force to the amendment of section 79, as it was inconsistent with the latter provision and it does not appear that it affected any other statute. Under section 29 the husband was still entitled to letters of administration, and the common law alone remained in force. If otherwise competent, he was entitled solely to take out letters of administration, and if he did not take them out, he was presumed to have assets in his hands sufficient to pay her debts, and was liable therefor.

While entitled to her estate at common law, there would seem to be no valid ground for holding that he should be deprived of

the same if unfortunately by reason of incompetency he was unable to administer. In the case considered the husband would have been competent to act as administrator but for the will of his deceased wife, and having acted as executor he holds the portion of the estate as to which she died intestate in his hands as such. Letters of administration therefore are not necessary to protect his interest, and no reason would seem to exist why, as at common law he was entitled to her estate, he could not hold that portion which lapsed by reason of her intestacy in regard to the same.

It may also be remarked that no person but the husband has administered upon the estate of the testatrix, nor was any person in opposition to him entitled to letters of administration. As executor for all purposes of administration he has exercised control over the property of his deceased wife. Although in name there is a difference between executor and administrator, there is really none in fact and in law, and each has control over the personal estate and the distribution of the same. His administration as executor under the will is in most respects the same as if he was an administrator under the statute, and as the portion undisposed of by the testatrix belongs to him, no reason exists why he should not retain it. This view is supported by *Fry v. Smith*, 10 Abb. N. C. 225, which, although a Special Term decision, is entitled to weight. The case of *Kearney v. Miss. Soc.*, 10 Abb. N. C. 274, which was previously decided by the same judge, is claimed to be inconsistent with *Fry v. Smith*. In the first case cited a distinction was made between the two cases, and it was held that if the latter case cited announced doctrines in opposition to the conclusion reached in the former, to that extent it could not be followed. See also *Williams v. Seaman*, 3 Redf. 148.

The appellant's counsel relies upon the case of *Sedgwick v. Stanton*, 14 N. Y. 289, as authority for the position that where a statute affirmative of the common law is abolished, the common law must likewise be abolished. In that case the question presented was in reference to the effect of the repeal of a statute in regard to maintenance, and the court held that the repeal of the statute abolished the common law of which it was declaratory. It will be seen that this related to a particular offense against a law establishing a crime, and under such circumstances there is the strongest reason for holding that when the statute was repealed no crime existed according to law. Section 30 of the Revised Statutes, which

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has been referred to, was only one of a series of provisions in regard to the distribution of property, and was evidently repealed because it came in conflict with section 79, as amended by the same act that repealed section 30. As it is manifest that it was repealed for the purpose of harmonizing different provisions of law, and other general provisions were left in force, and as to some of these provisions the common law was held to prevail by the decision of the court, the case cited is not in point.

There is nothing, we think, in the decisions or in the statutes which sustains the position that the effect of the Married Woman's Acts, which authorize her to make a will, is to extinguish the husband's right to any portion of her personal estate, except so much thereof as the will gives him, where by the lapse of a legacy she dies intestate as to some part thereof. In such a case the portion which becomes lapsed is undisposed of, and it is not apparent why it would not be regarded the same as if she had made no will. As to that part she certainly dies intestate, and no sound reason is urged why the rules relating to intestacy should not be held to apply. No argument, we think, can fairly be derived favorable to the intention of the legislature to abolish the common law in such a case, and the tendency of the decisions in this class of cases is to uphold the rights of the husband at common law unless they are expressly taken away by legislative enactment.

The doctrine of election has no application to this case.

The judgment should be affirmed.

RAPALLO, ANDREWS and EARL, JJ., concur with MILLER, J.; DANFORTH, J., dissents; RUGER, C. J., and FINCH, J., do not vote.

Judgment affirmed.

Killmer v. New York Central and Hudson River Railroad Company.

KILLMER V. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

(100 N. Y. 305.)

Carrier — payment of excessive charges — action to recover.

Excessive charges for freight paid to a railroad company for a long course of years voluntarily and without objection may not be recovered.*

ACTION to recover back excessive charges for freight. The opinion states the case. The defendant had judgment below.

Charles B. Meyer, for appellant.

H. H. Anderson, for respondent.

ANDREWS, J. We deem it unnecessary to consider the question argued by counsel, whether the authority conferred upon the Harlem Railroad Company by its charter (Laws of 1831, chap. 263, § 21) to "fix, regulate and receive the tolls and charges by them to be received for the transportation of property," etc., enables the company or its lessees, as claimed in behalf of the defendant, to charge what it pleases, and abrogates as to them the obligation imposed upon common carriers by the common law, to carry goods delivered for carriage upon being paid a reasonable compensation. There is certainly much authority against the construction contended for by the defendant. But we are of opinion the defendant is entitled to prevail in this action upon the ground that under the circumstances proved, and assuming that there was evidence upon which the jury might have found that the defendant had charged, and that Slawson Bros. had paid more than a reasonable sum for milk transportation, the payments were voluntary and not made under duress, or induced by fraud or deceit, or under circumstances which entitle Slawson Bros., or their assignee, to recover back the excess.

In general terms the action is brought to recover from the defendant the sum of \$60,000 which the complaint alleges was exacted from Slawson Bros. by the defendant between December, 1873, and December, 1879, for the transportation of milk from points on the line of the Harlem railroad to the city of New York.

*See *Peters v. Railroad Co.* (42 Ohio St. 275), 51 Am. Rep. 814, and note, 820.

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such sum being as alleged, the excess paid by Slawson Bros. for such transportation beyond a reasonable charge, in order to obtain possession of their property. Slawson Bros. were milk dealers in the city of New York. Their supplies were procured on the line of the Harlem road, and from 1866 to 1879 the milk purchased by them was transported in cans on the defendant's road from the place of shipment to the city of New York by a special milk train, and the empty cans were returned over the defendant's road to the place of shipment. For this service the defendant during this period, up to May, 1877, charged a tariff rate of sixty cents for every forty gallons of milk carried, and after that date a rate of forty-five cents. It was the custom of the defendant to require dealers to pay the freight at the time the milk was delivered in New York, but in dealing with Slawson Bros. this custom was at times departed from and payment made after delivery. There was never any agreement between Slawson Bros. and the defendant as to the rate of freight to be charged or paid beyond what may be implied from a general tariff rate fixed by the defendant and known to the Slawson Bros. and the payment by Slawson Bros. for the service at that rate. It was admitted on the trial that Slawson Bros. paid the freight daily at the tariff rate without making any objection. The evidence is uncontroverted that from 1866 to August, 1879, a period of thirteen years, there were almost daily shipments by Slawson Bros. over the defendant's road, and not only was there no negotiation between the parties as to the rate of freight to be charged, but there was never any complaint or remonstrance on the part of Slawson Bros. that the charge was excessive. The firm shipped the milk, paid the tariff rate for the transportation, asking no questions and apparently waiving all inquiry. The complaint bases the right to recover on the ground of extortion. The extortion, if any, consists simply in the fact that the defendant fixed an excessive rate, which Slawson Bros. paid without objection. If Slawson Bros. are entitled to recover under the circumstances, then every person who at any time within six years before the commencement of an action has paid to a carrier by rail, vessel, or other conveyance, an unreasonable charge for the carriage of goods, whether in one or a thousand instances, and whether the carrier is an individual or a corporation, can maintain an action to recover back the excess paid beyond a reasonable charge, although he paid without demur, and by not objecting apparently assented at the

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time to the propriety of the charge. The counsel for the plaintiff in his able argument cited cases from the English courts, arising under what is known as the equality clause in English railroad charters and statutes, which in substance prohibits preferential rates between shippers and requires equality of charge under similar circumstances. The cases referred to in general were actions brought by the shipper against whom a discrimination had been made in violation of the act, to recover back money exacted from him as a condition of carrying or delivering his goods in excess of the sum charged to other shippers for a similar service, and the actions were maintained, except where the inequality of the charge was known to the shipper or his agent and was paid without objection, in which case it was held that the plaintiff could not recover. *Evershed v. Lond. & N. W. R. Co.*, 3 Q. B. Div. 144; s. c., 28 Moak's Eng. Rep. 128; 3 App. Cas. 1029; 24 Moak's Eng. Rep. 625; *Sutton v. Gt. W. R. Co.*, 3 H. & C. 800; s. c., L. R., 4 H. L. Cas. 226; *Lancashire R. Co. v. Gidlow*, L. R., 7 H. L. Cas. 517; s. c., 12 Moak's Eng. Rep. 52; *Parker v. Gt. West. R. Co.*, 7 Man. & G. 253. In those cases there was a violation of a specific statutory duty on the part of the railroad corporation, and in all of them the payment was made either under protest or in ignorance of a fact which could only be known in general by the corporation, and which was concealed by the shipper.

What is a reasonable sum for transportation of goods on the great railroad lines of the country in a given case is often a complex question, into which enter many elements and considerations, and is incapable of exact solution. The legislature has reserved in the general act for the formation of railroad companies the right to regulate the question of freights, and in the charter of the Harlem railroad the right to alter, amend or repeal the same. Laws of 1850, chap. 140, § 28, subd. 9; Laws of 1831, chap. 263, § 18. While this reservation of power by the legislature does not probably exclude the enforcement of the common-law duty through an action in behalf of an individual injured by its violation, it is a safeguard against any long-continued abuse and oppression on the part of railroad corporations. But the common-law duty does not preclude special contracts between railroad corporations and shippers, regulating the freight charge, and whereas in this case freight has been carried for a long course of years at schedule price, the shipper making no objection and no inquiry as to the reasonableness of the

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charge, and when it was his interest to object if the charge was unreasonable, he must, we think, be deemed to have assented to the charge as reasonable, and to have voluntarily waived any objection thereto. At least the receipt by the company of the freight at the tariff rate under such circumstances has no element of extortion. The company is doubtless better informed than the shipper as to what would be a compensatory or reasonable charge, but many of the facts which enter into the formation of a judgment on the question are accessible to the shipper, and it would not be in accordance with general principles of justice that he should be permitted to forbear all means of ascertaining the truth, and after the lapse of years for the first time open a question which he did not at the time of the transaction regard of sufficient importance to engage his attention.

We are of opinion that this action cannot be maintained. The express admission that the payments sought to be recovered were made without objection, renders it unnecessary to consider whether the small part of the claim which accrued after the service of the notice of August 20, 1879, stands in any different position from the rest. There is no evidence that the notice was authorized by Slawson Bros., but if it was, in view of the admission, no question arising upon the notice is involved in the case.

The judgment should be affirmed.

Judgment affirmed.

All concur.

HERMANN V. NIAGARA FIRE INSURANCE COMPANY.

(100 N. Y. 411.)

Insurance — agency — notice.

The plaintiff procured insurance from the defendants through a firm of insurance brokers. The policy was subject to cancellation on notice, and provided that any person other than the assured procuring the policy should be deemed an agent of the assured and not of the company in any transaction relating to the insurance. *Held*, that notice of cancellation to the brokers, the plaintiff being ignorant thereof, was of no effect. (*See note, p. 200.*)

ACTION on a fire insurance policy. The opinion states the facts
The plaintiff had judgment below.

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William Allen Butler, for appellant.

N. B. Home, for respondent.

ANDREWS, J. Regarding the evidence in the most favorable light for the defendant, the authority conferred by the plaintiff on Kennedy & Buell was to procure insurance to the extent of \$8,500 upon the plaintiff's factory building, and the machinery and furniture therein, in the city of Troy, either in companies which they represented as agents, or in other companies. In execution of this authority Kennedy & Buell in the first instance placed the entire insurance in their own companies. Subsequently, on some of the companies refusing to carry the risk, they procured the defendant, through Kelly & Knox, its agents, to issue the policy in question, in place of the policies which had been cancelled. The defendant's policy was dated February 11, 1880, and was for the period of one year. The plaintiff resided in the city of New York, and the firms of Kennedy & Buell and Kelly & Knox, in the city of Troy. Upon the receipt by Kennedy & Buell of the defendant's policy from Kelly & Knox, the former firm forwarded it to the plaintiff in New York, and it remained in his possession until after the fire. There was no transaction between the plaintiff and Kennedy & Buell subsequent to the forwarding of the policy, except the payment by the plaintiff to them of a premium account, which included the premium on defendant's policy. The principal question in the case arises on the defense of cancellation. The policy provides that the company may terminate the insurance "on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term." The defendant prior to March 16, 1880, directed Kelly & Knox to cancel the policy. On that day they notified Kennedy & Buell of this fact, and an arrangement was made between the two firms, that Kelly & Knox should issue a policy in another company, to take the place of the defendant's policy, and that Kennedy & Buell should procure from the plaintiff the policy in question and deliver it to Kelly & Knox. Kelly & Knox thereupon wrote a policy in the Insurance Company of North America, and sent it to Kennedy & Buell, and the return premium on the defendant's policy, and the premium on the new policy were adjusted by entries in the mutual accounts of the two firms. The fire occurred March 20, 1880. The defendant's policy was then in the plaintiff's possession,

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and he had no knowledge or information of the transaction in respect to the cancellation, until after the fire. We are of opinion that that transaction did not operate as a cancellation of the defendant's policy. The defendant reserved the right to cancel the policy on notice to the insured. This condition would be satisfied by personal notice to the plaintiff, or to an agent authorized to receive it. But the authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal property, terminates with the procurement of the policy. It cannot in reason be held to continue after the insurance has been procured, and the policy has been delivered to the principal. An agent to procure a contract has no power to discharge it implied from the original authority merely. If he possesses that power it arises from some actual or apparent authority superadded to the mere power to enter into the contract. In this case Kennedy & Buell had no general authority to represent the plaintiff in all matters relating to the insurance as did the agent in the case of *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85, nor had they any apparent authority to accept notice of cancellation. The defendant's agent, when the transaction of March 16, 1880, took place, knew that Kennedy & Buell had sent the policy to the plaintiff in New York, and that it was then in his possession. The defendant relies upon a special clause in the policy which declares that "it is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this company, shall be deemed the agent of the assured named in the policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." This clause was primarily intended, no doubt, to define the relation of the insured to a person who applied for and procured the insurance, in a case where the same person was also agent for the insurer in taking risks and soliciting insurance; or in other words, in a case of double agency. The obvious meaning of the clause is that the person procuring the insurance shall, in respect to that matter, be deemed the agent of the insured whatever his relations to the company in other respects may be, and that in any transactions in respect to the particular insurance, he shall not be deemed the agent of the company, by reason of such other relations. But it does not declare that in all transactions relating to the insurance, after the inception of the contract, he shall be deemed the agent of the in-

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sured, but only that in respect to such other matters or transactions he shall not be deemed the agent of the company. The agent procuring the insurance may, in a given case, be the agent of the insured in transactions subsequent to the inception of the policy, but this would depend upon his actual authority. The special clause does not purport to constitute him a continuing agent, and such a construction would be very unreasonable. This clause has been construed in several cases in substantial accord with the views here expressed. *Grace v. Am. Cen. Ins. Co.*, 109 U. S. 278; *White v. Conn. Fire Ins. Co.*, 120 Mass. 330; *Adams v. Man. & Build. Ins. Co.*, 17 Fed. Rep. 630. The local custom in Troy, that notice of cancellation may be given to the broker who procures the insurance, was unknown to the plaintiff, and in so far as it assumes to make the broker an agent of the insured to receive notice of cancellation, although he had no such authority in fact, it is an attempt to override the legal construction of the contract, and was inadmissible to control it. The point that there was no forthwith service of notice of the fire, as provided in the policy, is answered by the fact that the defendant accepted the formal proofs of loss, and placed its refusal to pay the insurance on the ground that the policy had been cancelled. The defendant's agent was at the fire. The company's general officers knew of the fire soon after it happened. It needs but little evidence, under such circumstances, to justify the conclusion that the insurer had waived strict compliance with the provision as to notice.

We think the judgment should be affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER. — In *Grace v. Ins. Co.*, 109 U. S. 278, the court said: "The charge, in connection with the opinion delivered by the learned judge who presided at the trial, indicates that in his judgment the words in the eighth clause — 'It is a part of this contract that any person other than the assured, who may have procured the insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy,' — were intended to be qualified by the words 'in any transaction relating to this insurance.' Upon this ground it was ruled that notice of the termination of the policy was properly given to Anthony, who personally procured the insurance. We do not concur in this interpretation of the contract. The words in their natural and ordinary signification import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in all matters immediately connected with the procurement of the policy. Representations

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by that person in procuring the policy were to be regarded as made by him in the capacity of agent of the insured. His knowledge or information, pending negotiations for insurance, touching the subject-matter of the contract, was to be deemed the knowledge or information of the insured. When the contract was consummated by the delivery of the policy he ceased to be the agent of the insured, if his employment was solely to procure the insurance. What the company meant by the clause in question, so far as it relates to the agency, for the one party or the other, of the person procuring the insurance was to exclude the possibility of such person being regarded as its agent, 'under any circumstances whatever, or in any transaction relating to this insurance.' This, we think, is not only the proper interpretation of the contract, but the only one at all consistent with the intention of the parties as gathered from the words used. There is, in our opinion, no room for a different interpretation. If the construction were doubtful then the case would be one for the application of the familiar rule that the words of an instrument are to be taken most strongly against the party employing them, and therefore in cases like this, most favorably to the insured. The words are those of the company, not of the assured. If their meaning be obscure it is the fault of the company. If its purpose was to make notice to the person procuring the insurance of the termination of the policy equivalent to notice to the insured, a form of expression should have been adopted which would clearly convey that idea, and thus prevent either party from being caught or misled."

To the same effect, *Von Wien v. Scottish, etc., Ins. Co.*, 52 N. Y. Supr. Ct. 490; s. c., 82 Alb. L. J. 488.

In *Sullivan v. Phoenix Ins. Co.*, 84 Kans. 70, the court said of a similar clause: "Reading the whole contract together, it would seem that this condition must have reference to persons other than the regularly constituted agent of the company; otherwise the provision is a contradiction of other portions of the contract, wherein it appears that Forbriger was the duly-authorized agent of the insurance company at Atchison. He was its trusted representative at that place, not only for the purpose of soliciting insurance and forwarding applications therefor, but he was furnished the necessary blanks and printed documents for the transaction of its business, and also the policies of the company already signed by its president and secretary, with authority to complete them as contracts between the company and its patrons. In the policy it was specifically stated that it should 'not be binding until it was countersigned by Robert Forbriger, agent for the company at Atchison, Kansas.' He cannot occupy the antagonistic position of being agent for both the parties. And under the admitted facts, we must hold him to be the agent of the defendant. By this singular condition the company would shirk all responsibility for any mistake or fraud committed by its agent during the preliminary negotiations in its behalf, by stipulating that he is the agent of the assured. Such a condition involves a legal contradiction, and is invalid."

"In *Planters' Ins. Co. v. Myers*, 55 Miss. 479, the policy sued on contained a like provision, and the court there held that—'Such stipulation cannot convert the agent who procured the application, and made the contract of insurance on behalf of the company, into an agent of the assured, such company

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being authorized by its charter to appoint agents and define their duties, and the agent in question being charged with the duty of soliciting and taking applications for policies, collecting premiums, etc. It is not destructive of the power of the agent, but an attempt of the company to dissolve the relationship between the company and the agent, and to establish it between the latter and the assured. Even if such agent could, by stipulation, be converted into an agent for the assured, he would still be the agent of the company, for in that capacity he professed to deal with the assured, and he was competent to bind his principal within the legitimate range of his employment.

"In *Eilenberger v. Protective Mutual Fire Ins. Co.*, 89 Penn. St. 464, the Supreme Court of Pennsylvania, referring to a similar condition in a contested policy, held that as to all preliminary negotiations, the agent acts only on behalf of the company, and that the company cannot escape the consequences of fraud or mistakes of its agent by inserting a stipulation in the policy that such agent shall be deemed the agent of the assured, who at the time of applying for the policy was ignorant of the insurer's intention to so stipulate.

"In *Gans v. St. Paul Fire and Marine Insurance Co.*, 43 Wis. 108, it was held that where an agent is authorized by the insurance company to receive applications and issue its policies, the company could not, by a stipulation in the policy, substitute the assured for itself, as the principal of the agent, and the court commenting on the question, remarked that—'If the stipulation substitutes the assured for the company, as the principal of the agent, then it is competent for a person to make a contract with his own agent which shall bind a third party who is a stranger to it, and who never agreed to be bound by it. This would be a manifest absurdity.' See also *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Columbia Ins. Co. v. Cooper*, 14 Wright, 881; *Beetcher v. Hawkeye Ins. Co.*, 47 Iowa, 258."

GRIFFEY v. NEW YORK CENTRAL INSURANCE COMPANY.

(100 N. Y. 417.)

Insurance — assignment — pledge.

A pledge of an insurance policy as collateral security is not an assignment within the prohibition of the policy.

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

W. E. Hughitt, for appellant.

Reynolds & Collins, for respondents.

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DANFORTH, J. It may be conceded that the defendants notified the insured before the fire, of a desire to cancel a policy, but there is no evidence that any portion of the unearned premium was paid back; on the contrary, they only proposed to do this after the policy should be returned by the insured. They had no right to impose that condition, nor could they require the insured to take any step in the matter. The option to cancel was reserved, but to be exercised by "notice, and refunding a ratable proportion of the premium for the unexpired term" of the policy. What the defendants did was to ask the insured to return the policy for cancellation, promising in that case "to remit to them the return premium." This was not enough. Notice of cancellation and actual payment or tender of the sum due could alone suffice. *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 465. Under the provision of the policy requiring notice of loss to be "forthwith" given, it was enough for the insured to act in that matter with diligence and without unnecessary delay. It was therefore properly left to the jury to say whether in view of all the circumstances of the case, the notice actually given was sufficient. It was not instantaneous, but the delay was brief. Among other things, it appeared that the fire occurred on the 30th of August. The bank gave notice of it on the 1st of September, and on or before the 4th of September the assured also notified the defendants of the fire and loss. Even this delay was accounted for. Sunday intervened, and during the other days the assured was busy with the adjusters of different insurance companies concerned in the loss, and with matters connected with the fire. The jury might properly, in view of these and other things in evidence, find that the delay was not unreasonable. The question, at least, was for them.

The other point made for the appellant rests upon the claim against "assignment" of the policy. It entails a forfeiture, and must therefore receive a strict construction. Hence no other meaning can be given to the language used, than a most rigid and literal interpretation permits, and as the condition is a limitation of liability, it cannot be extended by interpretation so as to include a case not clearly within the words. *Rann v. Home Ins. Co.*, 59 N. Y. 387. So if the words are of doubtful meaning, or susceptible of two fair interpretations, they should be construed to uphold rather than avoid the policy. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405. In the first place it is apparent that nothing but an effectual assign

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ment or transfer will come within its terms. In this sense the policy was not transferred. No interest in the insured property was conveyed, but it all remained as before. In case of loss therefore the transferee could not recover not only because it had suffered no loss and was not a party to the contract, but because the transfer of the policy was not accompanied with any interest in the subject of insurance. The clause in question, although of several members, is in itself single, and is aimed against the sale, or transfer, or any change in title or possession of the insured property, and the assignment of the policy, which it prohibits, is in connection with the events which affect the ownership of the things insured. They must be construed together, otherwise the words relating to the policy would have no meaning. Without them the assignment would be inoperative for any purpose. It would not render the policy void, but it would be of no value. If the property was burned the underwriters would be under no obligation to pay any one — not the assignee, for the property destroyed did not belong to him, so he incurred no damage, nor the assured, for he had parted with the contract of indemnity.

But if we take the prohibition as applying to the policy disconnected from the property, it will not work the result claimed by the appellant. An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, or chattel, or other thing. In that sense the policy in question has not been “assigned.” It, with others, was delivered to the creditor upon an agreement that the policies should stand as collateral security for certain claims held by it against the insured, and in case of loss to the property insured, they should “be payable” to the bank, as its “claim against the insured should appear.” The assured did not part with the title. The transfer was not unconditional. They retained not only the whole insured property, but an interest in the policy. In any proceeding for its enforcement they would have been a necessary party, *Simson v. Satterlee*, 64 N. Y. 657; *Johnson v. Hart*, 3 Johns. Cas. 322; *Conover v. Mut. Ins. Co.*, 1 N. Y. 290; *Bard v. Poole*, 12 N. Y. 495; *Whitney v. M’Kinney*, 7 Johns. Ch. 144; *Field v. Mayor, etc.*, 6 N. Y. 179, s. c., 57 Am. Dec. 435, and upon payment of the debt, entitled to what they in fact have had — a redelivery of the policy. The agreement under which they transferred it did not profess to vary in any respect

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the contract of insurance. It was at most a mere appointment of the bank to receive, and a direction to the insurers to pay to it the loss, when if at all, it should accrue. In other words, it was an appropriation beforehand, to the payment of specific debts, of a portion of the money which might become due by reason of the cause insured against, and the plaintiffs had as much interest in the policy after its pledge to the bank as they had before. The money for which the insurers might become liable was to be applied to their use. The bank held it in trust as bailee, and not as owner, and until by an act of the assured some person, other than themselves, should stand in that situation, the prohibition against assignment could not apply, and the policy remained valid to protect their interests. *Hitchcock v. North Western Ins. Co.*, 26 N. Y. 63; *Jackson v. Silvernail*, 15 Johns. 277; *Shearman v. Niagara F. Ins. Co.*, 3 Sweeny, 470; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 80.

In *Conover's* case, *supra*, the charter of defendant provided that whenever the insured property "shall be alienated by sale or otherwise the policy shall thereupon be void," and it was held that the words did not embrace a mortgage since it creates but a lien or security, and does not transfer the title; and in *Shearman's* case, *supra*, the same rule was held to apply to a clause forbidding a transfer of the policy. To take away the cause of action in one case and to render void the policy in the other, equally requires a transfer or alienation of the entire insurable interest.

It seems indeed to be well settled that so long as the insured retains such an interest that he may be a sufferer by the loss, the policy remains valid to that extent.

The cases relied upon by the appellant do not seem inconsistent with this conclusion. In *Smith v. Saratoga Co. Mut. F. Ins. Co.*, 1 Hill, 497, there was not only an express and literal assignment of the policy, but of "all rights and claims which might arise thereon." *Savage v. Howard Ins. Co.*, 52 N. Y. 502; s. c., 11 Am. Rep. 149, related to a change of title to the insured property. *Ferree v. Oxford Ins. Co.*, 67 Penn. 373, differs from the case at bar in several particulars, but one is enough. There the court call attention to the condition which includes in words not only an assignment of the whole policy, "but of any interest in it," and also found in other parts of the policy an express intention to prohibit assignments made as collateral security. The one before us prohibits an assignment of the policy, that is, as we must construe it, an abso-

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lute assignment of the whole; the others forbid not only such assignment, but an assignment of any interest. These various and differing limitations would be entirely useless if they were not intended by insurers to distinguish between acts of the insured in the disposition of the policy as a whole, and its transfer by way of pledge or mortgage for a special and temporary purpose. In many cases the distinction indicated by the papers referred to is material, and I see no ground upon which it can be disregarded in this instance. Similar words have been held by other courts insufficient to include a transfer by way of pledge or security, and we find no reason to differ from them. *Ellis v. Kreutzinger*, 27 Mo. 311; *W. F. Ins. Co. v. Kelly*, 32 Md. 421; s. o., 3 Am. Rep. 149. If there is difficulty in the question it is because the language chosen and employed by the insurers leaves the matter in doubt, and to the benefit of that they are not entitled. *Herrman v. Mer. Ins. Co.*, 81 N. Y. 184.

The judgment appealed from should be affirmed.

All concur except EARL, J., dissenting.

Judgment affirmed.

MULRY V. NORTON.

(100 N. Y. 423.)

Water and water-courses — sea coast — riparian owner — changes in coast — injunction.

The plaintiff owned land on the seacoast at Far Rockaway, Long Island. Several miles east of his land was the island of Long Beach, bounded on the east by an inlet from the ocean to Hempstead bay. Between 1885 and 1899 the beach from opposite the island to the west of plaintiff's land was overflowed and washed away, and bars, shoals and islands were formed and constantly changing. By sudden, violent and frequent changes the inlet moved to the west of the plaintiff's land, and a continuous bar was formed. About 1899 the inlet closed up and the original one reopened, leaving a continuous beach to the west, with a lagoon inside of it running across the plaintiff's land. *Held*, that the title to that beach was in the plaintiff. (*See note*, p. 215.)

The plaintiff, keeper of a seaside summer hotel, was entitled to the beach in front of his premises, to which visitors resorted for bathing and air. The defendants setting up title, intruded thereon and undertook to get possession, and threatened litigation. One of them was of no pecuniary responsibility. *Held*, that an action to quiet title and for an injunction would lie.

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ACTION to set aside a lease from the town of Hempstead to the defendant, and for an injunction. The opinion states the facts. The plaintiff had judgment below.

Wm. N. Dykman, for appellant.

John E. Parsons, for respondent.

RUGER, C. J. This action involves the title to certain beach lands on the ocean shore at Far Rockaway. No dispute arises over the boundaries of the plot or the location of the beach, as being included within the description of the deeds under which plaintiff's grantors formerly occupied the premises, but it is claimed that the earth or sand composing the beach has been so affected by the storms and tides of the ocean that its ownership was lost by the plaintiff's grantors, and subsequent deposits made within the same boundaries were acquired by the owners of Long Beach, an island belonging to the town of Hempstead. This result is attempted to be supported under the rule governing the acquisition of real property by alluvion or accretion. The evidence tends to establish the following facts: That the beach in question is within the same boundaries, and with the exception of a narrow lagoon running crosswise through it, is of the same form and shape now as it existed from the year 1685, when it was conveyed to the plaintiff's remote grantors by its Indian owners, to about the year 1835. Between 1835 and 1869 the changes in the surface of the ground took place which it is claimed worked the transfer of the ownership. At the commencement of the process of change, Long Beach consisted of a small island lying southward of Hempstead bay, separated on the west from the beach in dispute by a navigable inlet called indifferently Hog Island, or East Rockaway inlet, or Brockle Face Gut, and a succession of beaches, islands, shoals and channels extending some four miles. This inlet was about half a mile broad and communicated directly with the westerly end of Hempstead bay. To the west of the inlet a bar or beach, known as Coot's bar, extended from the mainland south to a point opposite to Long Beach, forming the westerly shore of Hempstead bay, and from thence west a distance of about three miles until it reached the westerly line of the town of Hempstead. The beach to the westward of the inlet during the period from 1835 to 1869, underwent

a succession of changes which it is quite unimportant if not impossible to follow in detail, but usually consisted of a line or group of bars, shoals, islands and channels extending from the inlet to the shore of the mainland beyond the premises in dispute, but which were constantly undergoing physical changes by the influence of the laws to which they were naturally subject. These bars, shoals and islands were from the operation of the tides and wind, in filling the channels separating them, occasionally joined together, and at one time by the removal of the inlet in question to the westward formed a continuous bar from Long Beach to a point west of the premises in dispute, and remained in that position for about three years. The removal of the inlet to the west was not uniformly effected by gradual progression, but frequently advanced in "jumps" of a quarter to a half a mile in distance, and frequently added or took away from the lands to which they were joined sections of beach covering half a mile or less in extent as the result of a single storm. During the period of time in question various inlets at different points upon this bar were broken through from time to time, and were used by vessels trading in Hempstead bay until they were closed up by the action of the tide and wind, when other channels, by the operation of natural causes, would be opened in new places, and these openings would in turn become the channels through which vessels bound to and from Hempstead bay would pass.

About the year 1869 the inlets to the westward became closed up, and the original inlet adjoining Long Beach was reopened and has since become the sole channel of navigation for vessels entering the bay from the east. The process described finally resulted in attaching the beach in litigation to the mainland on the west, and forming a continuous beach about one thousand feet broad from such mainland to the inlet at Long Beach, being a distance of about four miles. This process also left a shallow and narrow lagoon or cove running inside of the beach in question from Hempstead bay to a point a little to the westward of the premises in dispute and separating the ocean beach proper from the mainland lying directly behind it.

In 1725 the formation of Coot's bar was of so permanent a character that it became the subject of a grant from its owner, the town of Hempstead, to one Hicks, and from that time to the present the said Hicks and his heirs and grantees have occupied and enjoyed

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the beach lying between the original Hog Island inlet and the west line of the town of Hempstead and reaching within about eighteen hundred feet of the premises in dispute. Portions of this beach have at times been submerged or washed away, and it has at times been cut into by the formation of new inlets to Hempstead bay, but at all times there has been some beach lying above the ocean tides, but outside the line of high-water mark, capable of occupation and enjoyment by its owners.

Under these circumstances the trial court refused to find that the extension of Long Beach to the westward was made by the process of accretion, and held as a question of law that the defendant's lessors, the town of Hempstead, did not acquire title to the land in dispute by that process, and we concur in the conclusion reached by it.

There seems to be but little conflict in the authorities, or even between counsel in this case, as to what constitutes alluvion or accretion. It was held in *Rex v. Lord Yarborough*, 3 B. & C. 91, "that accretion is an increase by imperceptible degrees." "The lord of the manor claims when there is a gradual accession to land adjacent." Wash. Real Prop. 58. "The test of what is gradual as distinguished from what is sudden seems to be that though witnesses are able to perceive from time to time that the land has encroached on the sea line, it is enough if it was done so that they could not perceive the progress at the time it was made." Angell Tide Waters (1st ed.), 71. It was said in *Emans v. Turnbull*, 2 Johns. 314; s. c., 3 Am. Dec. 427, "that if the marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable it belongs to the sovereign." Citing 2 Bl. Com. 261; Harg. Law Tracts, 28. "To acquire title to land by alluvion, it is necessary that its increase should be imperceptible." *Halsey v. McCormick*, 18 N. Y. 147.

It would seem from these definitions that two insuperable objections exist to the claim of the appellant; one being that a large part of the formations of which the beach in question now consists was created anterior to the junction thereof with Long Beach and constituted property subject to acquisition and ownership by others prior to plaintiff's claim, and secondly, that the mode of progress of Long Beach to the westward was frequently by sudden removals of the inlet, and the consequent junction of large and perceptible sections of beach to the easterly lands — as the result of a sudden and

violent operation of the tides. We therefore think the court below correctly held that the defendant did not acquire a legal right to the possession of the lands in question by his lease from the town of Hempstead.

It is also claimed by the appellant, that even if he has failed to establish title in himself to the premises, the plaintiff still is not entitled to maintain this action because of defects in his own title. It is argued that the beach in question, having been once cut off from the mainland and surrounded by navigable water, thereby became an island, which, like other formations of land in tide water, was the property of the State.

The evidence establishes a continuous chain of title to the premises in dispute from its native Indian owners down to the plaintiff, covering a period of two hundred years, and each conveyance bounding its grantee upon the Atlantic ocean. Under the law of this State such a description makes the line of high-water mark the boundary of the granted premises, but it also carries with it the liability of such a line to fluctuate by the action of the water. These lines of description for a period of one hundred and fifty years included the *locus* in dispute, and the same, with the uplands, was occupied and enjoyed by the plaintiff's grantors and now remains the property of the plaintiff, unless the title thereto has been lost to his grantors through the causes referred to.

It is undoubtedly true that the proprietorship of lands may be lost by erosion or submergence. The one consisting of a gradual eating away of the soil by the operation of currents or tides, and the other of its disappearance under the water and the formation of a navigable body over it. The plaintiff's grantors have at times since 1684 remained the owners and occupants of the mainland adjacent to the beach in dispute, and as such owners have been entitled to the rights which attend the title of littoral or riparian owners. "They would be entitled to whatever should be gained from the sea by alluvion or dereliction, and their title was liable to be lost by the advance of high-water mark, bringing their lands within the ebb and flow of the tide." *East Hampton v. Kirk*, 84 N. Y. 218; 2 Bl. Com. 262; *In re Hull & Selby Ry.*, 5 Mees. & Wels. 327. It is not however every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to

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effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained.

When portions of the mainland have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true however that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. Angell Tide Waters, 76, 77; Houck Rivers, § 258. Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Angell Tide Waters, 77-80, and cases cited. It is said in Hargraves' Law Tracts (Sir Matthew Hale's *De Jure Maris*), 36, 37: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property, and accordingly it was held by COOKE and FOSTER, M. 7 Jac. C. B., though the inundation continue forty years." "But if it be freely left again by the reflex and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues." And again: "As touching islands arising in the sea or in the arms of creeks or havens thereof, the same rule holds which is before observed touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie* it is true they belong to the crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven doth in point of property belong to a subject, either by char-

ter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject according to the limits and extents of such propriety." See also Gould Waters, § 166. A case quite in point is referred to by the respondent's counsel as arising in Delaware in 1815, decided by the Court of Common Pleas upon a learned opinion by Judge WILSON, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. It arose over the ownership of an island called Wilson's Bar, which had been created by alluvion upon land formerly contained within the boundaries of an island called Little Tinnicum, but which at some time had been worn away by the ocean. The court say: "The right to the new island and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was destroyed by the force of the winds and the waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining land covered by the water if it was regained either by natural or artificial means, it continued to belong to the original proprietor." "The earth deposited on it became his by the right of alluvion, and of course this island formed on it by such deposit became his. And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion."

It would seem also to follow as the necessary consequence of these rules that the existence of the lagoon between the plaintiff's hotel property and the beach constitutes no obstruction to his proprietorship of the beach formation, however created, if located within the original boundaries of his possession. *Deerfield v. Arms*, 17 Pick. 43; s. c., 28 Am. Dec. 276. It was held in the case of *Railroad Co. v. Schurmeir*, 7 Wall. 272, that a sand-bar in the Mississippi river divided from the main land by a slough twenty-eight feet wide, and which at high water was entirely submerged, belonged to the riparian owner, although the acts of Congress made the river a public highway at the place in question. It is also said that "rocks and shoals lying along the margin of navigable fresh rivers belong to the riparian owners." Gould Waters, § 77.

The evidence in the case and the findings of the trial court concur in establishing the fact that during the period of change hereinbefore mentioned portions of the beach in front of plaintiff's

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premises became submerged, but at all times there existed upon or near such premises, shoals, bars or islands, which afterward became the nucleus around which gathered the deposits now composing the land subject to litigation. It seems to us clear that the owners of this property did not lose their title thereto by reason of the changes described, and that the State has not acquired any property therein. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tide-ways outside of the boundaries of property subject to individual ownership.

We are also of the opinion that the principles applicable to the apportionment of lands formed by accretion among the owners of contiguous uplands is quite controlling as to the rights of the respective parties in this case. Such owners are entitled to lands made by accretion or reliction in front of their property and contiguous thereto in certain proportions according to the formation of their respective shore lines. *Houck Rivers*, § 162; 3 Wash. Real Prop. 58; *Angell Tide Waters*, 171. However such accretions may be commenced or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of his coterminous neighbor. "A littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purposes of using the right of navigation. This right is his only and exists by virtue and in respect of riparian proprietorship." *Gould Waters*, § 149; *Buccleuch v. Metropolitan Bd. of Works*, L. R., 5 H. L. 418; s. c., 2 Eng. Rep. 448.

The principles upon which the rights of littoral proprietors to lands reclaimed from the sea are determined have been frequently discussed in cases arising in our sister States, but those discussions are not important here, and the cases are referred to only for the purpose of showing that such reclamations are apportionable among the littoral owners according to the lateral lines of upland possessed by them. *Gould Waters*, §§ 162, 163, 164 and 165; *Deerfield v. Arms*, 17 Pick. 43; s. c., 28 Am. Dec. 276; *Wonson v. Wonson*, 14 Allen, 85; *Thornton v. Grant*, 10 R. I. 477; s. c., 14 Am. Rep. 701; *Emerson v. Taylor*, 9 Greenl. 44. These authorities were cited and approved in *O'Donnell v. Kelsey*, 4 Sandf. 202; affirmed in this court, 10 N. Y. 412. See also *Angell Tide Waters*, 258.

It would seem to follow from the principles referred to that the owner of Long Beach could not, even if the process of its enlargement and extension was effected by accretion, claim beyond the point where such accessions began to be made adjacent to the property of adjoining owners, and as the line of each successive owner of uplands was reached in the process of extension, a new obstacle to the appellant's claim would seem to arise. This result would occur undoubtedly after passing Hog Island inlet, as some of the land westerly thereof was originally solid beach, and occupied by the grantees of Hempstead before the extension of Long Beach.

Aside from those discussed no material objection was made to the judgment appealed from except that concerning the jurisdiction of a court of equity over actions of this character.

The circumstances of the case are peculiar, and we think within established principles entitle the plaintiff to the relief sought. He was the owner of a hotel upon the ocean beach greatly resorted to by visitors in the summer for the benefit of surf bathing and sea air, and which could be enjoyed by them advantageously only by the undisputed control of the beach in question by the owner of such hotel. The use and character of the property was such that intruders thereon could not be excluded by substantial barriers, and a remedy against them by an action of trespass would necessarily be of doubtful success, and probably afford an inadequate indemnity for the injuries inflicted. During a long period of time successive efforts have been made by the defendant and his lessors to obtain possession of the premises in dispute and occupy them to the exclusion of the plaintiff. Actions have been threatened against him and claims of title made, which constitute a serious annoyance to the owner and impairment of his ability to derive an adequate compensation for the use and rental of such property. The defendant Norton transferred an interest in his lease to the other defendant Levy in order to multiply the claimants to the beach, and the prospect of successive litigations in connection therewith. These annoyances had continued for a series of years and occasioned damage to the plaintiff's rights of property which could not be easily ascertained or adequately compensated for in an action at law. The evidence also tended to show that the defendant Levy was a person of little pecuniary responsibility and presumably unable to respond in damages for the injury his conduct was liable to inflict upon the plaintiff's rights. Under similar circumstances the jurisdiction of

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a court of equity to interfere by injunction to quiet the title and prevent an injury, for which no adequate remedy exists at law, has been frequently exercised and approved by the courts. Hilliard Inj., chap. 10, § 1; *Watson v. Sutherland*, 5 Wall. 74; *Livingston v. Livingston*, 6 Johns. Ch. 497; *Lacustrine Fertilizer Co. v. L. G. & F. Co.*, 82 N. Y. 476; *Hart v. Mayor of Albany*, 3 Paige, 213.

We think this a case where the remedy by injunction was proper, and within the principles laid down in the cases cited.

The judgment should therefore be affirmed.

Judgment affirmed.

All concur.

NOTE BY THE REPORTER.—In *Morris v. Brooks*, Delaware Common Pleas, July, 1815, cited in the principal case, WILSON, presiding judge, said on the point in question:

“The plaintiffs rely on two grounds in support of their claim to the bar, as annexed to Little Tinnicum, that it is alluvion, gradually formed by a deposit of earth, and actually united to that island before Mr. Brooke’s application, so that at low water there was no distinguishable line between them, and that it was found on the same spot that was formerly occupied by Little Tinnicum, which has been washed away by the river for a very considerable distance, but has been thus restored again. I think it appears very clearly from the evidence that Wilson’s Bar began to be formed and first appeared above the surface of the water a considerable distance below the present point of Little Tinnicum, and has by gradual accretions been extended, both up and down the river, until it has become united (at this time at least, though it is not clear that it was so at the date of Mr. Brooke’s application) to that island. It began to be formed and first appeared above the water in the same place which was formerly occupied by Little Tinnicum, and now extends principally over space occupied by that island, except that it probably has extended farther down the river than the island appears from any evidence produced to have ever extended.

“As the bar began to be formed so far below the island — was for a long time entirely distinct from it, and at length became united with it by its own extension upward by gradual accretions, it would probably be different to support the plaintiff’s claim to it as an alluvion, independently of the fact that it was formed on the same spot which had been occupied by the island. Upon that point however I do not mean to express an opinion, but shall confine my remarks to the question, what is the law arising from the fact last mentioned?

“It has been but slightly argued at the bar, and no authorities have been referred to. But I have given it as attentive an examination as has been in my power, and which I thought it merited.

“New islands arising in the sea or in a navigable river *prima facie* belong, according to the common law, to the king, in England, and in this country to the State. But this rule is not universal.

“ The right to the new islands and also to lands gained by alluvion or dereliction (in cases where they are not gained by *insensible* degrees), all of which are governed by the same principles, follows *the right to the soil which is covered with water*. As the king is the proprietor in general of the soil covered with the sea or a navigable river, it is reasonable that he should have the soil where the water leaves it dry; and this stands on the ground of the prerogative.

“ But where the right to the soil when covered with water belongs to a subject, he is entitled to all these increments (2 Bl. Com. 262; Hale *de Jure Maris*, chap. 4 and 6).

“ This is illustrated by the law relative to islands arising in private rivers. If an island arises in the middle of such a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore. Yet this, says Sir William Blackstone (2 Com. 261), seems only to be reasonable when the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is in the freehold of any one man, as it usually is, wherever a several fishery is claimed, there it seems just (and so is the constant practice) that the lyotts, or little islands arising in any part of the river, shall be the property of him who owneth the piscary and the soil. The rules relative to the sea and navigable rivers are formed on the same principles.

“ This subject is very satisfactorily explained by Lord Hale in his *Treatise de Jure Maris*, chaps. 4 and 6, to the whole of which I generally refer for the proof of the rule I have stated, that the right to a new island follows the right to the soil on which it was formed. This will be found from those chapters to be the rule with regard to all the *maritime increments*. I will state here particularly a few passages from them: ‘ If a subject hath had by prescription the property of a certain tract, or creek or navigable river, or arm of the sea, even while it is covered with water by certain known metes and extends, tho’ it should be relictcd, the subject will have the propriety in the soil relictcd.’ Harg. Law Tracts, 15. ‘ If a subject hath land adjoining the sea, and the violence of the sea swallows it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quality and bounding upon the firm land, the same can be known, though the sea leave the land again, or it be regained by art or industry, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac., C. B., though the inundation continue forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear.’ *Ibid.* 15.

“ The case of the Town of Shinbridge in 18 H., 8, is stated in p. 16. ‘ The river of Severn had gained upon the town of Shinbridge so much that its channel ran over part of Shinbridge lands, and lost part thereof unto the other side (*Aure*), and then threw it back to Shinbridge. It shall not belong to Aure, neither was it at all claimed by the King, though Severn be in that place an arm of the sea; but it was restored to Shinbridge as before. The propriety of the soil was not lost to the owners who had it before.’ ‘ The soil under the water must needs be of the same propriety as it is when it is covered with

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water. If the soil of the sea while it is covered with water be the King's, it cannot become the subject's because the water has left it. But when the land, as it stood covered with water, did by particular usage or prescription belong to a subject, then *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris*, vel *brachii ejusdem*, belongs to the same subject.' Id. p. 81. 'As touching islands arising in the sea, or in the arms or creeks, or havens thereof, the same rule holds which is before observed touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *prima facie* it is true they belong to the Crown, but where the interest of such *districtus maris*, or arm of the sea or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to a subject, according to the limits and extent of such propriety, for the propriety of such a new accrued island follows the propriety of the soil before it came to be produced. Id., 86, 87.

"This principle, so strongly supported by authority, and so evidently grounded on reason and justice, proves that Wilson's Bar is not to be considered as a new island belonging to the Commonwealth, and the subject of a grant from the Commonwealth, but that it is a part of that island and the property of the owner of that island. Though the surface of the lower part of that island was destroyed by the force of the winds and waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining soil covered by the water. If it was regained either by natural or artificial means, it continued to belong to the original proprietor. He might embank it and thereby again exclude the waters if circumstances permitted. The earth deposited on it by the river became his by the right of alluvion, and of course this island formed on it by such deposit became his. And though it probably has now extended beyond the limits of the old island, the addition is plainly an alluvion, as it has arisen from gradual and imperceptible accretions."

See *Lovington v. County of St. Clair*, 64 Ill. 56; s. c., 16 Am. Rep. 516, and note, 524. Hale's *De Jure Maris*, chap. 5 and 6, may be found in 16 Am. Rep. 54.

In *Camden and Atlantic Land Co. v. Lippincott*, 45 N. J. L. 405, the boundary in question was "storm-tide mark of the Atlantic ocean." Held, that the boundary was a shifting and not a fixed one. The court said:

"A more uncertain and vacillating boundary than that adopted for the seaward line in the Miles deed could not be devised. It cannot be taken as an absolute — a fixed — boundary. It must be treated as relative, and as having relation to the condition of things as they are from time to time.

"*Scrutton v. Brown*, 4 B. & C. 485, is the leading case on this subject. The plaintiff sued the defendant in trespass for taking stones from the seashore adjoining the plaintiff's manor. The plaintiff was the owner of the shore between high and low-water mark. The defendant justified under one Taylor, in whom was vested an interest in the shore conveyed by the plaintiff by a deed of lease and release, dated September, 1773. The deed described the

premises granted as extending from the south at low-water mark, to the north at high-water mark. It appeared at the trial that since the date of the deed the sea had gradually encroached upon the land twelve or fifteen feet or more, and consequently the high and low-water mark had advanced in the same degree inland since that time. The defendant contended that the deed of 1778 conveyed to the grantees the soil of the shore between high and low-water marks, wherever those marks might be. The plaintiff insisted that the deed conveyed only that part of the shore which in the year 1778 lay between high and low-water mark, and consequently that he was entitled to recover for any stones taken by the defendant higher up on the shore than the high-water mark reached at that time. The court sustained the defendant's contention, and held that by the deed the right of soil in that portion of land which from time to time lay between high and low-water mark passed to the grantee, and that as the high and low-mark shifted, the property conveyed by the deed also shifted. The same rule of construction was adopted by ALDERSON, B., *In re Hull and Selby Railroad Co.*, 5 Mees. & W. 827. He said: 'Suppose the crown, being the owner of the fore-shore — that is, the space between high and low-water mark — grants the adjoining soil to an individual, * * * in that case the right of the grantee of the crown would go forward with the change. On the other hand, if the sea gradually covered the land so granted, the crown would be the gainer of the land.' In *Dunlop v. Stetson*, 4 Mason, 849, one Budge became entitled to lands lying on the Penobscot river together with the flats in front of the land to low-water mark. He conveyed thereout to one McGrathry a lot bounded and described as beginning at "a stake on the west bank of the Penobscot; * * * thence to a stake and stones on the bank of the same river; * * * thence running on the western bank of said river to high-water mark.' In a controversy between the representatives of Budge and the grantees of McGrathry, the court construed the grant to the latter as being only to the front line of the bank, excluding the flats. It was suggested that since the period of the grant to McGrathry there had been an encroachment by the gradual wear of the river, and Mr. Justice STORY, citing *Scrutton v. Brown*, held that if that be so, the grantees of McGrathry must be confined to the bank as it actually existed, and that they had no legal or equitable title to such portion of the flats as stood in the place of so much of the bank as had been washed away. The Supreme Court of Massachusetts applied the same principle of construction to a grant of flats where the river had receded from the shore, and by that means the flats had been considerably increased in extent after the grant had been made. *Adams v. Frothingham*, 8 Mass. 852. The same court also held that the grantees of the privilege of taking seaweed from the beach below certain land conveyed were not affected by the gradual shifting of the boundaries of the beach by the action of the sea, but were entitled to take seaweed from the beach wherever the beach might be below the land conveyed, and that it mattered not whether the sea had gained upon the land or had receded. *Phillips v. Rhodes*, 7 Metc. 322.

"The principle on which these cases were decided is that in grants of lands lying along the sea shore, the parties act with a knowledge of the variety of

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changes to which all parts of the shore are subject. The grantee takes no fixed freehold, but one that shifts with the changes that gradually take place. The proprietor of lands having such a boundary is obliged to accept the alteration of his boundary by the gradual changes to which the shore is subject. He is subject to loss by the same means that may add to his territory; and as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations, and he will in such case hold by the same boundary, including the accumulated soil. *Tyler Bound.* 40; *Phear Waters*, 12-48; 8 *Kent*. 435; *New Orleans v. United States*, 10 *Pet.* 662-717. He takes his title, as was said by Mr. Justice STORY in *Dunlop v. Stetson*, subject to those common incidents which may increase or diminish the extent of his boundaries.

“This principle applies as well to a boundary by the storm-tide mark as to a boundary by the high-water mark or by the low-water mark. Such a boundary will leave in the grantor that space of the beach which lies between the ordinary high-water mark and the fast land, and is subject to be washed over by unusual tides so frequently as to be waste and unprofitable for use; but the title of the grantee will advance or recede as the line of storm-tide changes from time to time.”

In *Linthicum v. Coan*, Maryland Court of Appeals, October 1885, the question was as to the ownership of alluvion in the Patapsco river. The court said:

“The evidence for the plaintiff in the court below tended to prove that at the date of the patent for Linthicum's Comet, the river at ordinary high tide overflowed all the land in question, and that the portion of it east of Sweetzer's bridge began to be formed some years after 1860, and the formation of land commenced from the edge of the main channel of the river, and did not make outward from the fast land on the shore. The evidence on the part of the defendant contradicted this testimony, and tended to prove that the river had been gradually filling up from the bank on the Baltimore county side toward the channel, since 1846 or 1848, and that the flats and marsh on the bank of the river in 1854 were nearly in the same condition as they are now, except that at that time they were not so solid as they are now. There was also evidence on the part of the plaintiff that there was a great freshet in the river in or about the year 1868, which filled up the bed of the river very much, and deflected the main channel fifteen or twenty feet from its original course toward the Anne Arundel shore, east of the bridge, and made a deposit of from fifteen inches to two feet of mud on the premises described in the declaration.

“It is thus seen that we are to determine the respective rights of the riparian proprietor, and of the owner of the bed of the river. In *Giraud v. Hughes*, 1 G. & J. 249, this court considered one of the questions arising in this case, and they laid down the law as follows: ‘The principle seems to be well settled that where a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding, or any gain by alluvion in the same manner, shall as a compensation for what it may lose in other respects belong to the proprietor of the adjacent or contiguous land.’ And the court refers with approbation to 2 Blackstone's Commentaries, page 261, where it is said, ‘as to land gained

from the sea, either by alluvion by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water mark. In these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner generally recognized by the authorities, although it is sometimes expressed in language slightly different.' * * *

"In *Rex v. Yarborough*, 8 Barn. & Cress. 91, the court of Kings Bench decided that the word 'imperceptible' in this connection must be understood as expressive only of the manner of accretion, and as meaning imperceptible in its progress, and not imperceptible after a long lapse of time. And when this case came before the house of lords, on writ of error, the judgment below was affirmed. The lords requested the opinion of the judges, and the unanimous opinion of all the judges who heard the argument was delivered by BEST, C. J., and concurred in by the Lord Chancellor, and Lord ELDON. The extract of this opinion states its substance as follows: 'Land not suddenly derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown.' 5 Bing. 168. And if we refer to the original authority on which this whole doctrine is founded, it is manifest that these decisions correctly state the meaning of the rule. The earliest exposition of it in any work on the common law is found in the second chapter of the second book of Bracton, who adopts almost *verbatim* the language of the civil law, as it is found in the Institute, liber 2, title 1, section 20. The words of the text are: '*Est autem alluvio latens incrementum; et per alluvionem adjecti dicitur quod ita paulatim adjicitur quod intelligere non possis quo momento temporis adjiciatur.*' Alluvion is a secret increase which is so gradually added, that it cannot be known at what moment it is added. It is contradistinguished from those large additions which are made to the land, when the sea suddenly recedes, or when it casts up by its immediate and manifest force large quantities of earth and sand. The rights of the riparian proprietor do not depend at all upon the question whether the amount of increase can be definitely measured by fixing accurately the original location of the bank of the river. If the increase were not perceptible after it had accrued, it would hardly be necessary that the title to it should be determined by the law. In *Lord Yarborough's* case the land formed by accretion amounted to four hundred and fifty acres, and in the noted case of the city of New Orleans against United States, the accretions embraced the whole river-front of the city, and were of immense value. There is an annual rise in the Mississippi river which continues for several months; when the waters subside they leave in some places large deposits of mud, which in the course of successive accumulations reach the height of the banks of the river, and become firm land. The land in this way is gradually formed, inasmuch as it is the result of causes continually in operation through a considerable period. But the deposits are frequently very large. It is said that on one occasion, after the fall of the waters, the *batture* was extended into the river a space measuring from seventy-five to eighty feet, and was covered with mud to a depth varying from two to seven feet. In dealing with this case, the Supreme Court discard altogether the use of the word 'imperceptible.' They say: 'The

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question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way, he cannot be held accountable for his gain. 10 Pet. 717. The court evidently considered that the justice and true sense of the rule depended on the question whether the land was formed by the operation of causes extending through a length of time without any reference to the consideration whether the stages of the progress toward the final result could be perceived. * * *

“If the land in question was formed by gradual accessions extending from the shore into the river, it would belong to the riparian proprietor, and this would be the case notwithstanding the fact, that by the influence of floods and freshets large deposits of mud may have been made in the bed of the river. These deposits would of course materially contribute to the formation of land, and would hasten the time when it would appear above the surface of the water. But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water, and when this is the case, it is irrelevant to consider the cases which, operating beneath the surface of the stream, have brought about the result. On the other hand, if land was formed in the river and extended inward toward the shore it would be the property of the plaintiff, with all its accretions. Under these circumstances it would have belonged to the State, if the patent had not been issued, and the plaintiff has of course acquired the State title.”

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(100 N. Y. 446.)

Evidence — letters and telegrams.

The presumption is that letters properly directed and mailed were received,* and the same is true of telegrams given to a telegraph company for transmission, and properly addressed, and the presumption becomes conclusive when not denied.

ACTION for money received as plaintiff's agent. The opinion states the point.

John R. Abney, for appellant.

George H. Adams, for respondent.

*To same effect, *Austin v. Holland* (67 N. Y. 571), 25 Am. Rep. 246.

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FINCH, J. [Omitting other matter.] But other and very serious questions were raised by objections taken to the admission in evidence of a large number of letters and telegrams. Many of these documents were important in their bearing upon the facts, and must have largely contributed to the ultimate result. They consisted of three letters from Norris, plaintiff's agent, and manager at San Francisco, to defendant Otis, and one from Otis to Norris; and then of a large number of telegrams; and the objections were that as to those purporting to be addressed to the defendant there was no competent evidence that he ever received the originals, and as to those purporting to have been signed by him, that there was no competent evidence that he ever wrote or sent them. Our consideration must be limited to these precise objections, and to the question as between sender and receiver.

Norris swears that he sent the three letters written by him to Otis. In the absence of any proof to the contrary, or any inquiry as to the mode, we must understand this to mean that they were mailed in the usual manner. If there was doubt about that the attention of Norris should have been drawn to it, and the manner of transmission challenged. It would be extremely critical to deny to the form of expression used by the witness its ordinary and usual interpretation, because it might have been more precise and explicit in a case where the party addressed is examined as a witness, and does not deny the receipt of the letters, although material to the issue. On such a state of facts the jury were authorized to believe that the three letters sent to Otis were received by him. The one letter sent by Otis to Norris was identified by the latter, who knew his correspondent's handwriting, as appears by the deposition. Notice to produce the letters of Norris was given, and not being produced, copies of them were read in evidence.

But there is more difficulty about the telegrams. The originals were shown to have been destroyed by the telegraph company, so that a resort to secondary evidence became necessary. We shall first consider the proof as to those sent by Norris. It consisted merely of his statement that he sent the messages by telegraph to Otis, who resided in New York, directed to him at that city. Such direction appears upon the copies produced. And the first question is whether a similar presumption of fact follows the delivery of a message properly addressed to the telegraph company for transmission, to that which follows the delivery of a letter to the post-

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office. The drift of authority gives an affirmative answer. *Gray Telegraphs*, § 136; *Commonwealth v. Jeffries*, 7 Allen, 548; Whart. Ev., § 76; *State v. Hopkins*, 50 Vt. 316; *Scott & Jarnagin Tel.*, § 345. The presumption indulged is one of fact, and so open to rebuttal and contradiction, and consists merely in the natural inference which may be drawn from the experienced certainty of transmission. The great bulk of letters sent by mail reach their destination, and equally so the great bulk of telegrams. A failure in either case is an exception, possible, but rare. The letters are transported by government officials acting under oath, and upon a system framed to secure regularity and precision; the telegrams by private corporations, whose success and prosperity depend largely upon the promptness and accuracy of the work, and are faithful under the incentive of interest. These companies perform a public service and are regulated to some extent by the public law. They are authorized to cross with their wires any waters within the limits of the State (Laws of 1845, chap. 243); to construct their lines along and upon the public roads and highways (Laws of 1848, chap. 265); and upon and over the lands of individuals, paying the agreed or appraised compensation therefor (Laws of 1853, chap. 471); injury to their lines is made a misdemeanor (Laws of 1870, chap. 491); the companies are required to transmit all dispatches in the order of their receipt; to accept and forward them from connecting lines; the operators are exempt from military service and jury duty (Laws of 1861, chap. 215); and it is made a misdemeanor for any employee to divulge the nature or contents of a private telegram, or willfully refuse or neglect to transmit or deliver the same (Laws of 1867, chap. 871). There is thus impressed upon the telegraph service something of a public character, and thrown around it the guard and the obligations of the public law, and it seems to us reasonable to assimilate the rules of evidence founded upon transmission by mail to that of transmission by telegraph. It may be that the presumption of correct delivery, agreeing in kind with that raised upon delivery to the postoffice should be deemed weaker in degree, but in view of the wide extension of telegraph facilities, and of their increasing use in business correspondence, and the difficulty of tracing a dispatch to its destination, we think it should be held that upon proof of delivery of the message for the purpose of transmission, properly addressed to the correspondent at his place of residence, or where he has shown to have been, a pre-

sumption of fact arises that the telegram reached its destination, sufficient at least to put the other party to his denial and raise an issue to be determined. Here there was no denial, and the presumption, however weak at the outset, became strong and convincing. There is greater safety in conceding the existence of such a presumption of fact under a system like ours, in which the party addressed is always at liberty to testify, and if dead his representatives are protected against the evidence of his adversary as to personal transactions and communications.

So far then as the telegrams were material, we think there was no error in their admission. That they were in truth authorized and genuine became in the end most thoroughly established by Otis' omission to dispute them as a witness.

Some other questions of evidence were raised which we have examined but deem it unnecessary to discuss.

The judgment should be affirmed with costs.

Judgment affirmed.

All concur.

SCRIVER V. SMITH.

(100 N. Y. 471.)

Deed — covenant of quiet enjoyment — overflowing.

Where the owner of land on a stream conveys it with a covenant of quiet enjoyment, and a lower owner, by virtue of a paramount right, raises his dam and floods the land so conveyed, this is a breach of the covenant.

ACTION for breach of covenant. The opinion states the case. The plaintiff had judgment below.

W. P. Cantrell, for appellant.

Edward C. James, for respondent.

EARL, J. On the 25th day of March, 1875, the defendant conveyed to the plaintiffs a parcel of land situate in Franklin county, described in the deed as follows: "Commencing at a point forty rods south and forty rods east from the north-west corner of said lot No. 44, in the east line of a forty-acre lot formerly owned by Philip Brvant, and at the south-west corner of land formerly owned

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by George W. Douglass, running from thence south in the east line of the Bryant lot to the land leased or owned by the Northern Railroad Company; thence east in the north line of said railroad to the west bounds of land formerly owned by John Mitchell and now owned by Henry Mitchell; thence northerly in said Mitchell's line to the bridge or highway; thence westerly in the center of the highway until it strikes the line dividing the land of C. J. Morgan from that of the party of the first part; thence westerly along said line to the place of beginning, being all of the land owned by the party of the first part south of the highway and up to the north line of the railroad, excepting and reserving the old house now standing on said land in the sand bank west of the river, with the appurtenances, and all the estate, title and interest therein of the said parties of the first part." The deed contained a covenant in the following language: "And the said Eli B. Smith does hereby covenant and agree to and with the said parties of the second part, their heirs and assigns, that the premises thus conveyed in the quiet and peaceable possession of the said parties of the second part, their heirs and assigns, he will forever warrant and defend against any party whomsoever lawfully claiming the same or any part thereof." It is alleged in the complaint that the parcel of land described contained a grist and flouring-mill with the water-power and mill privileges appurtenant; that it was known as the John Bush Grist and Flouring-Mill property, and had been used in connection with the water-power afforded by the river mentioned in the deed as a grist and flouring-mill for many years; that its value consisted almost wholly in its use for that purpose; that the plaintiffs have not been permitted peaceably to occupy and enjoy the premises or the mill property, privileges and water power, but that on the contrary one Douglass at the time of the conveyance was the lawful owner of a certain mill-dam in the river below the premises conveyed to the plaintiffs and of the right to raise the height of such dam eight and one-half inches above the height at which it was maintained at the time of the conveyance to the plaintiffs, and that having such right he did raise his dam to such height and did thereby cause the water of the river to set back upon the premises conveyed to the plaintiffs, and to flood a portion thereof, and to impede the discharge of water from their wheel-pit and raceway, and the operation of their mill, and did thus evict them from a portion of their premises, deprive them of the use and enjoyment

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thereof, and cause them other damage; and it is also alleged that after due notice to the defendant and with his approval, in order to test the right of Douglass so to raise his dam, the plaintiffs brought an action against him, in which he established his right so to raise and maintain the dam.

By his demurrer to the complaint the defendant admitted all these allegations of fact, and the sole question for our determination is, whether the facts alleged showed a breach of the covenant continued in defendant's deed, his contention being that the facts failed to show such an eviction from the premises conveyed, or some portion thereof, as was absolutely essential to the maintenance of the action.

There can be no dispute that the covenant for quiet enjoyment can be broken only by an eviction, actual or constructive, from the premises conveyed, or some portion thereof. This is not a mere technical rule, having no foundation in principle or justice, but it has its foundation in the reason that the covenantee, who has obtained possession, should not be permitted to recover for breach of the covenant for a mere failure or defect of title, so long as he is left in possession, as he may never be disturbed and thus never suffer damage. The covenantor should therefore be held liable, not only in all cases coming technically within the letter of the rule, but also in all cases falling really within its reason. It has therefore been held that where the covenantee has not been able to obtain the possession of the premises conveyed on account of a paramount outstanding title, and thus has in fact never been ousted from the possession, he may yet maintain an action for the breach of the covenant. *Shattuck v. Lamb*, 65 N. Y. 499; s. c., 22 Am. Rep. 656. It has also been held that where there is an outstanding title to an easement in the premises conveyed, which materially impairs the value of the premises and interferes with the use and possession of some portion thereof, the covenant is broken, although there is not a technical physical ouster from the actual possession of any portion thereof. 1 Bouv. Law Dict. 543; *Rea v. Minkler*, 5 Lans. 196; *Adams v. Conover*, 87 N. Y. 422; s. c., 41 Am. Rep. 381; *Clark v. Estate of Conroe*, 38 Vt. 469; *Russ v. Steele*, 40 Vt. 310; *Lamb v. Danforth*, 59 Me. 322; s. c., 8 Am. Rep. 426.

In this case Douglass had a paramount right to an easement to set back the water of the river and to flood the land conveyed, and in the exercise of that right he did cause a portion of the land con-

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veyed to be flooded and covered with water, and of such land the plaintiff was deprived of the use, and really and practically of the possession, and thus there was substantially an eviction. Suppose Douglass, in the exercise of an easement owned by him, had flooded the whole of plaintiffs' land to the depth of one foot or ten feet, thus destroying the water power and depriving the plaintiffs of any beneficial use or possession of the land, could it be maintained that there had been no eviction, and therefore no breach of the covenant for quiet enjoyment? To hold that it could, would be to disregard the reason of the rule, and to sacrifice substance for the mere form of words in which the rule is generally expressed. So far as one permanently floods the land of another there is a physical invasion of the land and a practical ouster of the possession thereof, and in a real sense such land is taken from the owner, and so it has been held. *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Eaton v. R. Co.*, 51 N. H. 504; s. c., 12 Am. Rep. 147; *Story v. N. Y. Elevated R. Co.*, 30 N. Y. 185; s. c., 43 Am. Rep. 146.

Our argument may receive some re-enforcement also from the history of real estate law. Anciently, by the feudal constitution, if the vassal's title to the fee which he had received at the hands of his lord, and for which he was to render certain duties, failed, he had the right to call upon his lord in a proper form of action for other land of equal value. The modern personal covenants contained in deeds, which are not more than two hundred years old, are a substitute for this ancient right. Now instead of other lands, the grantee recovers upon his covenants damages for the land from which he was ousted or to which his title fails. Suppose some feudal lord had given to his vassal land which another person subsequently flooded under a paramount right, can it be doubted that the lord could have been compelled to give another land of equal value? And so now, instead of land, the grantor should upon his covenant of warranty be compelled to give damages.

We think therefore that so far as Douglass, under paramount right, invaded the land conveyed to the plaintiffs and flooded the same with water, there was an eviction sufficient for the maintenance of this action.

But there is still another view which may be taken of this case. Every owner of land through which a natural stream of water flows has the right to have it flow from his land unobstructed in its natural channel, unless such right has been curtailed by grant or

adverse possession. This is said to be a natural right *publici juris*. The learned counsel for the defendant contends that this right rests upon an easement which an upper owner upon a stream has in the lands below him for the passage of the water over such lands in its natural channel, and his contention has some authority for its support. *Cary v. Daniels*, 5 Metc. 236; *Prescott v. Williams*, 5 Metc. 429; s. c., 39 Am. Dec. 688. Such rights have some semblance to easements, and no harm or inconvenience can probably come from classifying them as such for some purpose. But they are not in fact real easements. Every easement is supposed to have its origin in grant or prescription which presupposes a grant, and it is quite absurd to suppose that the owner of land at the head of a stream has an easement by grant or prescription for its flow over all the land of the riparian owners for many miles to its mouth. Would any of the usual covenants in a deed be violated because a natural stream of water flowed through the land and the upper owners therefore had an easement in such land? Clearly not. In Washburn on Easements, 19, it is said: "The term 'natural easements,' as applicable especially to the case of flowing water, is often made use of by courts of common law and is not likely to mislead the reader, inasmuch as the context usually shows in what sense the term is employed. But as will appear hereafter that an easement when technically considered is an interest which one man has in another's estate by grant or its equivalent, prescription, it seems at first thought to be inconsistent to characterize what belongs to an estate as inseparably incident thereto and forming part and parcel thereof, by the name of easement or servitude. It may be in many respects, and perhaps most respects, like an easement and may be treated accordingly, and yet will hardly come within the requirements of what constitutes an easement at common law." Again at page 276 the learned author speaking of the flow of water in natural streams, says: "The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturæ* and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself in its natural state unaffected by the tortious acts of a neighboring land-owner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." In Angell on Water-Courses, § 90, it is said: "The right to the use of the flow of water in its

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natural course and to the maintenance of its fall on the land of the proprietor is not what is called an easement, because it is inseparably connected with and inherent in the property in the land; it is a parcel of the inheritance and passes with it." In *Stokoe v. Singers*, 8 Ell. & Bl. 31, ERLE, J., said: "The right to the natural flow of water is not an easement, but a natural right." In *Johnson v. Jordan*, 2 Metc. 234, SHAW, C. J., speaking of the right of an owner of land through which a stream of water flowed, to have the water come to and pass from his land unobstructed, said: "It is inseparably annexed to the soil and passes with it, not an easement, not as an appurtenance, but as parcel." Easements proper are incorporeal rights, but the right to have water flow in its natural channel is a corporeal right.

So the right to have the water flow to and from the land conveyed to the plaintiffs was a corporeal right, and part and parcel of the premises granted and was therefore covered by the deed. The plaintiffs were disturbed in the possession of the parcel thus granted by Douglass under his paramount right, and in part evicted therefrom, and therefore there was a breach of the covenant for quiet enjoyment. They bought a water power. That was a corporeal right covered by the deed, and they were evicted from a portion thereof.

These views are in no degree in conflict with any thing decided in the case of *Green v. Collins*, 86 N. Y. 246; s. c., 40 Am. Rep. 531. There the easement in question was an artificial one, an incorporeal hereditament, and it was held that because it did not belong to the grantor it did not pass as appurtenant to the land granted, was not covered by the deed, and hence was not within the scope of the covenant for quiet enjoyment. That case rests upon ample authority, and the views herein expressed show it cannot apply to such a case as this.

The learned counsel for the plaintiffs has relied much upon the case of *Adams v. Conover*, *supra*. To some extent that case is an authority for his contention. There, as here, the plaintiff bought water power, a corporeal right, and he was dispossessed of some of it. He bought a dam at a certain height. That was part and parcel of the premises which the deed professed to convey, and he was obliged to remove some of it, and thus he was actually deprived of a portion of the premises covered by his deed. That case too rests upon ample authority. Suppose one takes a deed with a cove-

nant for quiet enjoyment of land with a house thereon, and it turns out that a third person has title to the house which he removes. Can it be doubted that the grantor would be liable on his covenant for quiet enjoyment? *Combs v. Fisher*, 3 Bibb, 51; *Funk v. Oreswell*, 5 Iowa, 88; *West v. Stewart*, 7 Penn. St. 122; *Mott v. Palmer*, 1 N. Y. 564. If in the case supposed, the house is three stories high, and in consequence of covenants with adjoining land-owners there is no right to maintain more than two stories, so that the grantee is obliged to remove the third story, would there not be a dispossession and eviction of so much of the premises conveyed, and thus a breach of the covenant?

It has sometimes been supposed that there was a conflict between the cases of *Green v. Collins* and *Adams v. Conover*. The distinction between the two cases was clearly pointed out in the opinion written in the last case. In the one case the grantor got all that was covered by his deed and there was no breach of warranty. In the other case the grantor did not get all that was covered by his deed, and there was a break of warranty. The distinction between the two cases is as wide as a gulf, and it would seem that any diligent, unprejudiced, competent investigator should not fail to perceive it.

The claim is also made, on behalf of the defendant, that the plaintiffs must be presumed to have known of the paramount right of Douglass at the time of their purchase, and hence that they cannot now complain of its existence. But it does not appear that that right was apparent, and there can be no presumption that they knew of it. If such knowledge made any difference, it was matter of defense which it was incumbent upon the defendant to establish.

We therefore conclude that the judgment should be affirmed, with costs, with leave to the defendant to answer on payment of the costs within twenty days after their adjustment.

All concur.

Judgment accordingly.

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SHUTTS V. FINGAR.

(100 N. Y. 539.)

Negotiable instrument — note on demand — holding indorser.

No action lies against the indorser of a joint and several promissory note, not of a partnership, payable on demand with interest, where no demand was made as to one of the makers until after the statute of limitations had run against it.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

John B. Whitbeck, for appellant.

Samuel Edwards, for respondent.

RUGER, C. J. We think the court below erred in applying the doctrine of *Merritt v. Todd*, 23 N. Y. 29, to the facts of this case, and that its true solution is to be found in the rules prescribing the duties and obligations of a creditor to his surety. This court, in the case of *Parker v. Stroud*, 98 N. Y. 379; s. c., 50 Am. Rep. 685, following *Merritt v. Todd*, expressly reserved from the effect of the decision the question as to the liability of the indorser, when the maker had been released from liability by the laches of the holder. The doctrine of *Merritt v. Todd* has been so long acquiesced in, and has been followed and approved in so many cases, that it would be impolitic now to permit the rule there laid down to be questioned or disturbed, and it must therefore be considered as settled law in this State that a note payable on demand, with interest, is a continuing security, and no cause of action arises thereon against an indorser until after actual demand.

The defendant is here sued as an indorser of a demand note, dated March 19, 1866, made by Jacob Niver, James Ham and Norman Niver, payable with interest to Francis O'Coner or bearer. The defendant afterward became the owner and holder of the note, and in April, 1868, transferred it to one Potts, and at the request of Potts then indorsed it. Potts held the note about one year, when he sold it to the plaintiff, who has ever since remained its owner. Jacob Niver paid interest on the note annually until March, 1875, since when no payments have

been made thereon. Jacob Niver died in 1876, and administrators of his estate were then appointed. In March, 1877, the plaintiff, after demanding payment of the note of the makers, James Ham and Norman Niver, and also of the personal representatives of Jacob Niver, and failing to collect it, notified the defendant of the fact and of his intention to hold him for its payment, and thereupon commenced this action in June, 1878.

The authorities now uniformly hold that the statute commences to run upon a note payable on demand in favor of the maker, at its date, *Herrick v. Woolverton*, 41 N. Y. 481; s. c., 1 Am. Rep. 461; *Wheeler v. Warner*, 47 N. Y. 519; s. c., 7 Am. Rep. 478; *Parker v. Stroud*, 98 N. Y. 379; s. c., 50 Am. Rep. 685, and that the expiration of six years from such date constitutes a bar to an action thereon unless a renewal of the cause of action has been effected by partial payments or otherwise. The makers in this case were not partners, and occupied no such relation to each other as constituted the party making payment in any sense the agent of the other for such purpose, and it necessarily follows that the payments made by Jacob Niver did not renew the note as to the other makers, and they were therefore discharged from liability thereon several years prior to any demand of payment from them. *Van Keuren v. Parmelee*, 2 N. Y. 524; s. c., 51 Am. Dec. 322; *Shoemaker v. Benedict*, 11 N. Y. 176; s. c., 62 Am. Dec. 95.

It must also be conceded upon settled principles of law that defendant after payment of the note would have no recourse for indemnity against any of the parties thereto, except upon the note itself, and if any of such parties were relieved from liability thereon either by the act or laches of the holder, the indorser lost his right of action against such party. The rule which upon payment of a note implies a promise by the maker to repay to the indorser the amount paid by him, proceeds upon the theory that the payment has been made at the request of the maker, and the cause of action arising in favor of the indorser is based upon the act of payment, and not upon the note. *Brandt Suretyship and Guaranty*, §§ 176, 179. Where however commercial paper is indorsed after its execution, to subserve the interests of the indorser, no such promise of repayment can be implied, and the only remedy for indemnity from the prior parties is by resorting to the paper itself. *Brandt Suretyship and Guaranty*, § 180. Upon payment of such obligation an indorser is entitled to demand its possession from the creditor with

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the right of subrogation, to all securities and remedies possessed by him against the prior parties thereon, unimpaired by any act or laches of such creditor. *Goodyear v. Wasson*, 14 Barb. 481; *Clason v. Morris*, 10 Johns. 524; *Beardsley v. Warner*, 6 Wend. 613; Dan. Neg. Inst., § 1306; *Townsend v. Whitney*, 75 N. Y. 532.

The obligation which a party assumes upon indorsing a note is, among other things, to pay it, in case the parties primarily liable thereon, after demand, neglect or refuse to do so. The demand stipulated for is an essential part of the indorser's contract, and the same considerations which induce its requirement also require that it shall be made upon an existing cause of action, and of parties who are legally liable to respond in damages for its non-performance. Dan. Neg. Inst., § 1308. The contract, except in the case of parties originally incompetent to contract, is predicated upon the assumption that there is a legal liability against parties upon whom the demand is to be made. A demand upon the party after he has ceased to be liable would be an idle ceremony and a fraud upon the meaning and spirit of the indorser's contract.

Except in the case of a partnership note, the demand must also be made upon each of the several makers at the maturity of the note. *Gates v. Beecher*, 60 N. Y. 518; s. c., 19 Am. Rep. 207. It would be quite absurd to claim that a note could mature after the parties thereto had been discharged by the expiration of the period of limitation, and a demand upon such parties, after the bar of the statute had fallen, would not therefore be a compliance with the conditions of the indorser's liability. It was held in the case of an indorser of a note secured by mortgage upon real estate, the lien of which was lost by the neglect of the creditor to record it, that the surety was discharged, the court saying that it worked a change in the terms of the surety's undertaking. "He only guarantees the note as secured by the mortgage, and when the mortgage was destroyed, his contract was no longer existent." *Atlanta Nat. Bk. v. Douglass*, 51 Ga. 205; s. c., 21 Am. Rep. 234.

From the foregoing considerations it would seem to follow that in order to sustain the contention of the respondent, we should be required to hold that an indorser remains liable upon a note, after his principals have been discharged from their obligation upon it, and that his right of subrogation entitles him only to the possession of a security rendered worthless by the neglect of the creditor.

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Where such consequences are produced by the direct action of the creditor, all of the authorities concur in holding that it constitutes a good defense to the indorser, and it is difficult to see why the same consequences produced by the deliberate laches and inaction of the creditor should not lead to the same result.

There are cases holding that an indorser is not discharged by the delay of the holder in prosecuting the maker, at a time when the debt could be collected from him, and such remedy has become fruitless by the maker's subsequent insolvency. *Trimble v. Thorne*, 16 Johns. 152; *Wells v. Mann*, 45 N. Y. 327; s. c., 6 Am. Rep. 93. These cases proceed upon the theory that it is the privilege and duty of the indorser, after receiving notice of dishonor, to pay the note and enforce it himself, if he fears the impairment of the maker's solvency through lapse of time. We have however been unable to find any case holding that an indorser can be made liable who has had no notice of dishonor, or opportunity to take up the note, where the liability of the maker has been discharged by the *laches* of the holder in allowing the period of limitation to run thereon.

The responsibility of the indorser for the loss occasioned by the bankruptcy of a maker, after the maturity of a note, is put upon him because of the opportunity which is afforded him of protecting himself, and when he is deprived of this opportunity by the neglect of the holder, we know of no principle of law which will hold him liable for the consequences of such a loss.

It is a general rule that whatever discharges the maker or acceptor of a bill or note discharges the drawer and indorser, who are sureties, for the contract which they undertook to assume thus passes out of existence by the act of the beneficiary. Dan. Neg. Inst., § 1306. It is also said that "whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him but from which his discharge precludes them." The contracts of the parties to a note are said to be like the links of a pendant chain, if the holder dissolves the first every link falls with it. Dan. Neg. Inst., § 1307.

It was held in the case of *Beardsley v. Warner*, *supra*, that if the creditor does any act impairing the surety's claim against the maker it may be shown in defense of the surety. *Barhydt v. Ellis*, 45 N. Y. 111, holds that where by the laches of the creditor, the surety's means of indemnity are impaired, his liability is discharged

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to the extent of the loss sustained by reason of such neglect. The necessary implication from the rule thus laid down would seem to require his absolute discharge when the responsibility of an individual, liable for the whole debt, has been lost by the act of the creditor.

It is among the fundamental rules applicable to the relations of principal and surety that a creditor cannot vary or change the contract to the prejudice of a surety; that he cannot extend the time of its performance or release any security held therefor or discharge any party therefrom without thereby releasing the surety wholly or partially from his obligation. Dan. Neg. Inst., § 1308. In *Stewart v. Eden*, 2 Caines, 121, it was held, where the holder released one of the makers of a note, reserving however his liability to the indorsers, that such release did not discharge the indorsers. But it was there conceded that if the release had operated to wholly discharge such maker it would have been otherwise.

While there are some qualifications of the general rules above referred to, there are none that I have been able to find excusing a creditor for allowing the statute to run in favor of the principals upon a note by which they are discharged from liability. The general rule applicable to such laches seems to be well stated in the case of *Reese v. Barrington*, 2 Lead. Cas. in Eq., part 2, p. 373, cited in the note to Fell's Law of Guaranty and Suretyship, 217. "But although the creditor is not bound to take active measures to enforce payment of the debt, and may therefore stop short in those which he has taken, even when their further prosecution would have been successful, yet he is not entitled to relinquish any hold which he has actually acquired on the property or estate of the principal and which might have been made effectual for the payment of the debt. This is the necessary result of the rule that a creditor shall not arbitrarily shift the burden of a debt from the party primarily liable for its payment and impose it on another whose liability is secondary."

We are therefore of the opinion that an indorser cannot be held upon a note payable on demand with interest unless the holder can show a demand made of the makers upon a subsisting obligation against all of the parties thereto, and be able to deliver to such indorser upon payment by him the note unimpaired as an obligation by any act or omission of the holder occurring subsequent to the contract of indorsement.

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The judgment of the court below should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed.

All concur.

PEOPLE V. PLATH.

(100 N. Y. 500.)

Criminal law — abduction — “taking.”

Under a statute punishing the taking of a female under sixteen for the purpose of prostitution, there can be no conviction on her unsupported testimony, and where there is no proof of persuasion, but only of permission.

CONVICTION of abduction. The opinion states the case.

Wm. F. Howe, for appellant.

De Lancey Nicoll, for respondent.

RUGER, C. J. The defendant was indicted and upon trial convicted of the crime of abduction, in that he “with force and arms feloniously did take one Katie Kavanaugh for the purpose of prostitution, she, the said Katie Kavanaugh, being then and there a female under the age of sixteen years.” It was essential to the support of this conviction that the people show, not only a taking by the defendant within the meaning of the statute, but also that such taking was for the purpose of prostitution. Penal Code, § 282, as amended by § 2, chap. 46, Laws of 1884. If the evidence establishes only a taking and fails to show that it was for the prohibited purpose it is insufficient to sustain the conviction, and so proof of the fact that the person of the female was used for the purposes of prostitution without proof of the abduction would not bring the accused within the condemnation of the statute. It is elementary when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with the specific intent. Lawson Presumptive Ev. 472. Neither can a conviction under this act be sustained upon the unsupported evidence of the female abducted. Penal Code, § 283. In cases where corroboration is required there has been some diver-

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sity of opinion in the authorities, as to the particular facts which should be corroborated, and the extent of the corroboration needed in order to comply with the rule; but it is now conceded to be the general rule that it should tend to show the material facts necessary to establish the commission of a crime and the identity of the person committing it. When an offense was formerly proven by accomplices it was the usual practice of trial courts to advise an acquittal, unless such evidence was in some respects corroborated by other testimony (although at common law a conviction upon the evidence of the accomplice alone was sustainable). In those cases the extent and degree of corroboration rested in the discretion of the trial court, and necessarily varied according to the circumstances of the case. Although such cases are not strictly analogous to those where corroboration is required by statute, they yet furnish some help in determining the degree of proof required in the latter case. The rule as to the corroboration of an accomplice is stated in Roscoe's Criminal Evidence, 122, as follows: "That there should be some fact deposed to, independently altogether of the evidence of the accomplice, which taken by itself leads to the inference not only that a crime has been committed but that the prisoner is implicated in it." Russell on Crimes, 962, says: "That it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged." 1 Greenleaf on Evidence, § 381, lays down the rule as held by some that it is "essential that there should be corroborating proof that the prisoner actually participated in the offense, and that when several prisoners are to be tried, confirmation is to be required as to all of them before all can be safely convicted; the confirmation of the witness as to the commission of the crime being regarded as no confirmation at all as it respects the prisoner."

The policy of the statute under consideration would seem to forbid the conviction of a person of the crime of abduction upon the unsupported evidence of the subject of the crime, and a conviction founded upon the evidence of the abducted female alone as to one of the elements constituting the crime would be contrary to its implied prohibition. Such evidence must therefore tend to prove each of the facts constituting the crime, for otherwise a person might be convicted of an offense as to one of whose elements there

existed no proof except that of the alleged abducted female. If the corroborative evidence goes to the support of the alleged purpose alone it is apparent that there is no legal proof of the commission of a crime, and it would be the same if the corroboration was confined to a support of the taking alone, and the proof as to the purpose was uncorroborated. It is not indispensable that such corroboration should be furnished by positive and direct evidence, but proof of circumstances legitimately tending to show the existence of the material facts will be sufficient to authorize a conviction. In one form or the other however proof must be given aside from that of the female tending to establish the commission of a crime, and that it was perpetrated by the person accused before a conviction can be lawfully had.

An examination of the proof in this case fails to disclose any evidence corroborating the testimony of the female alleged to have been abducted, as to the participation of the defendant in the abduction, assuming that her evidence established a taking within the meaning of the statute. We have however grave doubts as to the sufficiency of such evidence to establish such taking. *Regina v. Olifier*, 10 Cox C. C. 403. But passing over that question, we will examine the evidence which it is claimed corroborated the testimony of the abducted female.

Her evidence was to the effect that in July, 1884, the defendant kept a dance hall or concert saloon and drinking-place in Chatham street, New York, and had no previous acquaintance with or knowledge of the witness, her friends or family; that she was a young girl about fifteen years of age, of somewhat dissolute character, residing with her parents at Newark; that some time in the latter part of July, in company with a young companion, the former inmate of a house of prostitution, of her own free will, she visited New York without the consent of her parents, and in strolling about the streets came to the defendant's saloon and entered. After sitting in the bar-room for awhile she saw the defendant go behind the bar and asked him "how much it was to see the entertainment;" he replied "nothing, my little dear, come in." He then treated the girls to soda water and asked them if they came to stay, to which Kavanaugh replied that she did. He then invited the girls to go up stairs and while there offered Kavanaugh a dress which she declined. He also took indecent liberties with the persons of both girls, and after remaining there about twenty minutes

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left them. Both girls voluntarily remained in the place several days, and the Kavanaugh girl for about one month, during which time she had intercourse with a large number of men. No evidence was furnished by the prosecution showing that the defendant knew the true name of the girl or the place of residence of herself or family, or that he had had any previous acquaintance with her or knowledge of her family, or their circumstances or condition. No direct proof was given to establish the existence of any fact testified to by Kavanaugh, but she was attempted to be supported by circumstances alone. Two witnesses testified that they visited defendant's saloon the latter part of August and found quite a number of women and men assembled there engaged in dancing, drinking and sitting around together, among whom was Kavanaugh. They asked defendant if he had there a girl by the name of Kavanaugh who came from Newark. Defendant denied any knowledge of such a girl, and offered to allow them to search the premises for her. While they were talking Kavanaugh disappeared. It nowhere appeared that defendant was acquainted with the true name of Kavanaugh, or that she came from Newark. The witnesses also inspected the upper rooms of the saloon and there found a number of small apartments filled with beds and bunks; they saw women intoxicated and some quarreling and fighting going on. Afterward in September, one of the witnesses saw a man and woman in bed together there, and the man stated that he was not the husband of the woman. A physical examination of the girl revealed appearances indicating that attempts at sexual intercourse with her had been made, but that in fact it never had been accomplished. Beyond this no evidence was given looking toward corroboration of the testimony of the alleged abducted female.

We are utterly unable to see how this evidence tends to prove any of the facts going to show the agency of the defendant, in inducing Kavanaugh either to come to or remain in his place, unless a presumption of criminal persuasion is always to be imputed to a person with whom a dissolute female is domiciled. That he kept a disorderly house and was engaged in a vile and reprehensible occupation is quite sufficiently demonstrated, and that the object of Kavanaugh's residence in his house was presumably for the purpose of prostitution; but there is nothing in the corroborative proof inconsistent with the theory that her stay there was the result of her own will, uninfluenced by any persuasion, allurement or device of the

defendant. The evidence does not tend to show that the influences inducing Kavanaugh to come or remain at the defendant's house were any different from those operating upon the other inmates of the place or upon females generally, who had not become inmates.

It is a lamentable fact that a life of prostitution presents attractions to some young and inexperienced females and that many are induced to enter upon it by the expectation of pleasures to be derived, wants to be supplied, or disagreeable social conditions to be escaped, and that from some or all of these causes combined, the haunts of vice or immorality are too largely supplied; but the statute in question was not intended to provide a remedy for this evil, or prescribe a punishment for those who kept such places. There is nothing in the section of the act under which defendant was convicted making the employment of a female under sixteen years of age for purposes of prostitution or sexual intercourse a criminal offense, except where it is accompanied with a taking of her person by some active agency for such purpose. The word "takes" seems to be used to distinguish the act prohibited from those where the female is merely received, or permitted and allowed to follow a life of prostitution without persuasive inducement by the person accused.

The statutory age under which the consent of the female does not deprive the act of sexual intercourse of its criminal effect is fixed at ten years, but over that age the act in question does not make such intercourse a crime if effected without persuasion or devise, by the free will and consent of the female. The same evidence which has been produced against the defendant in this case could doubtless be given as to every keeper of a brothel or disorderly house in New York, and it would tend to impair confidence in the administration of the law and confound the distinction in crimes made by statute to permit this conviction to be upheld upon the proof shown by the record. Every criminal, however vile, has a right to require that the elements of his offense shall be clearly defined by law and established by legal proof before he can be convicted thereof, and until then he may safely assert his immunity from punishment for any offense which is not thus defined and proved. The defendant in this case is entitled to the same presumption of innocence which prevails in other cases, and we are constrained to say that evidence has not been given here rebutting such presumption.

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We think the evidence was insufficient in the absence of the proper confirmatory proof to warrant his conviction, and that the judgment of the General Term and Sessions should be reversed and a new trial granted.

Judgment reversed.

All conc ur.

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CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CURTIS V. MURPHY.

(88 Wis. 4.)

Innkeeper — guest.

The plaintiff, who lived in the same town with and very near the defendant's hotel, went there at midnight with a disreputable woman, registered as "C. and wife," and was assigned a room. At the same time he delivered to the clerk some money for safe-keeping. The clerk absconded with the money. *Held*, that the plaintiff was not a guest, and could not recover the money from the innkeeper.

ACTION to recover a deposit of money. The opinion states the case. The defendant had judgment below.

J. E. Wildish, for appellant.

John A. Wall, for respondent.

COLE, C. J. The defendant in this action was the proprietor of the St. James hotel in Milwaukee. The plaintiff was a single man, and kept a saloon not many blocks distant from the hotel. The following facts are clearly shown by the plaintiff's own testimony. About twelve o'clock at night on the 13th of March, 1882, the plaintiff came to the hotel with a disreputable woman whom he had

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met on the street and whose name he did not know, and registered himself and the woman as "Thomas Curtis and wife," called for a room and it was assigned him by a person or clerk who was in charge of the office. The plaintiff testified that before going to his room he said to this clerk that he saw on the top of the register that all moneys and jewels should be given to the proprietor; when the clerk replied that the proprietor was in bed and that he held the position of night clerk. Thereupon the plaintiff handed the clerk \$102 for safe-keeping and took a receipt, which read, "I. O. U. \$102, signed by the clerk. That night the clerk absconded with the money. The plaintiff sues to recover it of the proprietor of the hotel.

The natural, perhaps necessary inference from the plaintiff's own testimony is, that he went to the defendant's hotel at midnight with a prostitute, and engaged a room solely for the purpose of having sexual intercourse with the woman. True, he says that he went to the hotel as a guest and asked the clerk if he "could stay there for bed and breakfast." But he lived near by, gave no reason why he did not go to his usual lodging place, therefore we feel entirely justified in assuming that he went to the hotel for the unlawful purpose above indicated. This being the case the question arises whether he was a guest in a legal sense, and entitled to protection as such. The learned counsel for the defendant insists that he cannot and should not be deemed a guest under the circumstances, and entitled to the rights and privileges of one. If the relation of innkeeper and guest did exist between the parties, it is difficult to perceive upon what ground the defendant can escape responsibility for the loss of the money handed to the clerk or person in charge of the office; for the common law, as is well known, on grounds of public policy, for the protection of travellers imposes an extraordinary liability on an innkeeper for the goods of his guest, though they may have been lost without his fault.

It is not easy, says Mr. Schouler, to lay down on the whole who should be deemed a guest in the common-law sense; the facts in each case must guide the decision. Bailments, 256. A guest is a "traveller or wayfarer, who puts up at an inn." *Calye's* case, 8 Coke, 32. "A lodger or stranger in an inn." Jacob's Law Dict. A traveller who comes to an inn and is accepted becomes instantly a guest. Story Bailments, § 477. "It is well settled that if a person goes to an inn as a wayfarer and traveller, and the innkeeper

receives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them." *Jalie v. Cardinal*, 35 Wis. 118. "The cases show that to entitle one to the privileges and protection of a guest he must have the character of a traveller; one who is a mere temporary lodger, in distinction from one who engages for a fixed period at a certain agreed rate. The main distinction is the fact that one is a wayfarer, or *transiens*, and it matters not how long he remains, provided he assumes this character." *Clute v. Wiggins*, 14 Johns; s. c., 7 Am. Dec. 451.

In these definitions the prominent idea is that a guest must be a traveller, wayfarer, or a transient comer to an inn for lodging and entertainment. It is not now deemed essential that a person should have come from a distance to constitute a guest. "Distance is not material. A townsman or neighbor may be a traveller and therefore a guest at an inn as well as he who comes from a distance or from a foreign country." *Walling v. Potter*, 35 Conn. 188. Justice WILDE says, in *Mason v. Thompson*, 9 Pick. 283; s. c., Am. Dec. 471, that "it is clearly settled that to constitute a guest in legal contemplation, it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse there the innkeeper is chargeable on account of the benefit he is to receive for the keeping of the horse." Judge BRONSON, in commenting on this case in *Grinnell v. Cook*, 3 Hill, 485, 490; s. c., 38 Am. Dec. 663, says where the owner of a horse sent the animal to an inn to be kept, but never went there himself, and never intended to go there as a guest, it seemed but little short of downright absurdity to say that in legal contemplation he was a guest. On principle it would seem that a person should himself be either actually or constructively at the inn or hotel for entertainment in order to establish the relation of landlord and guest. In *Atkinson v. Sellers*, 5 C. B. (N. S.) 442, COCKBURN, C. J., remarks: "Of course a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment and the innkeeper is justified in supplying it."

If a traveller have no personal entertainment or refreshment at an inn, but simply care and food for his horse, he may be a guest, for he makes the inn his temporary abode — his home for the time

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being. *Ingalsbee v. Wood*, 36 Barb. 452; *Coykendall v. Eaton*, 55 Barb. 188. And while the definition of guest has been somewhat extended from its original meaning, it does not include every one who goes to an inn for convenience to accomplish some purpose. If a man and woman go together or meet by concert at an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from considerations of public policy to protect travellers and wayfarers, not merely from the negligence but the dishonesty of innkeepers and their servants, to be extended to such persons? If so, then for a like reason it should protect a thief who takes a room at an inn and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders. We do not think that the relation of innkeeper and guest can or does arise in the cases supposed. One whose *status* is a guest is a traveller or transient comer who puts up at an inn for a lawful purpose, to receive its customary lodging and entertainment. It is not one who takes a room solely to commit an offense against the laws of the State. So upon the facts detailed by the plaintiff himself, we have no hesitation in saying that he was not a guest at the hotel within the legal sense of the term. The relation of landlord and guest was never established between them.

We feel the more confidence in the correctness of this conclusion when we consider the duties of an innkeeper. An innkeeper is bound to take in all travellers and wayfaring persons and to entertain them if he can accommodate them for a reasonable compensation, and he must guard their goods with proper diligence. Bac. Abr., tit. "Inns and Innkeepers (C.);" Story Bailm., § 476. Now if the defendant had been aware of the purpose of the plaintiff in applying for a room, could he not have refused to receive him into his house? Nay, more; if the plaintiff had been received by the clerk and a room had been assigned him, could not the defendant on learning the purpose for which the room had been taken, have incontinently turned the plaintiff and the woman with him into the street, or have called the police and had them arrested? It seems to us there can be no doubt of the right of the defendant thus to have treated the plaintiff. But if the plaintiff was a guest and entitled to the rights and privileges of a person having that *status* at the hotel, he could not have been turned into the street, though

his profligate conduct was outraging all decency and ruining the reputation of the hotel.

The questions which have frequently come before the courts for consideration were whether a person, upon the facts of the case, was a traveller or temporary sojourner so as to be deemed a guest, or whether he was to be regarded as a boarder or one at the hotel as a special customer. These questions are elaborately examined in some of the cases above cited; also in *McDaniels v. Robinson*, 26 Vt. 316; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 547; *Hancock v. Rand*, 94 N. Y. 1; s. c., 46 Am. Rep. 112; *Smith v. Keyes*, 2 T. & C. 650; *Fitch v. Casler*, 17 Hun, 126; *McDonald v. Edger-ton*, 5 Barb. 560; *Shoecraft v. Bailey*, 25 Iowa, 554; *Manning v. Wells*, 9 Humph. 746; s. c., 51 Am. Dec. 688.

It seems to have been taken for granted in the court below that the plaintiff was a guest at the hotel. But the learned County Court held that § 1725, R. S., requires the guest to deliver his money to the innkeeper himself, or to a clerk having authority from the innkeeper to receive it. As it did not appear that the clerk in this case had such authority, the defendant was relieved from responsibility for the money lost by the clerk. We should hesitate to affirm the correctness of this view of the law. On the contrary we think a traveller when he goes to a hotel at night and finds a clerk in charge of the office, assigning rooms, etc., has the right to assume that such clerk represents the proprietor and has authority to take charge of money which may be handed him by a guest for safe-keeping. But still in the view which we have taken of the character of the plaintiff, and that he was not a guest at the hotel, this error of the court is immaterial. On the whole record the judgment is right and must be affirmed.

Judgment affirmed.

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PEASE V. LANDAUER.

(88 Wis. 20.)

Negotiable instrument — check — equitable assignment.

As between drawer and holder, a check is an equitable assignment, and the drawer may not arbitrarily stop payment. (*See note, p. 252.*)

THE opinion (third paragraph) states the case.

Shepard & Shepard, for appellant.

Jenkins, Winkler & Smith, and C. H. Van Alstyne, for respondent.

TAYLOR, J. It will be seen from the foregoing statement of facts that the question whether the holder of a check can maintain an action at law against the bank upon which it is drawn to recover the amount thereof upon a refusal of payment on presentation, the drawer of the check having a deposit account in such bank to his credit for an amount equal to or in excess of the amount of the check at the time of presentation, is not involved in this case. Nor do we think the other question is involved, viz., whether the drawer of the check may lawfully, as between himself and the bank, direct the bank to refuse payment of his check drawn upon his account; or in other words stop payment of his check before presentation, so that the bank, though willing, would have no authority in law to pay the same on presentation. For the purposes of the consideration of this appeal it may be admitted that the decided weight of authority is in favor of the proposition that no action at law can be maintained by the check-holder against the bank for a refusal to pay the same on presentation, and that the drawer may, before presentation, stop payment, so that the bank would have no legal authority to pay the same. The argument upon both sides is clearly and ably stated by Mr. Morse in his work on banks and banking (2d ed.), 29, 35, 258, 263, 265, 266-275, 302-304, 525-538; and see cases cited.

It seems to us that the real question presented in this case is whether in equity, as between the holder of a check for value and the drawer, the bank being indifferent as to whether the amount due to the drawer shall be paid to him or the check-holder, the

check-holder should be paid in preference to the drawer. The receiver in this case stands in no better position than the firm who drew the check; he stands in its place, and for the purpose of this case we must treat it as though the firm who drew the check was still in existence. *Coates v. First Nat. Bank*, 91 N. Y. 20, 26; 2 Story Eq. Jur. (10th ed.), § 1228; Burrill Assignm. (2d ed.), 483; *Hawks v. Pritzlaff*, 51 Wis. 160; *Estabrook v. Messersmith*, 18 Wis. 551; High Receivers, § 495; *Van Alstyne v. Cook*, 25 N. Y. 489; Kerr Receivers, 183-185.

Briefly we have this state of facts: The firm of E. D. Davis & Co. gives Joseph M. Pease a check upon their bank in Milwaukee for the sum of \$574.23, in settlement of an indebtedness due from them to Pease. At the time the check was given and when presented for payment, there was sufficient standing to the credit of the firm in the bank upon which it was drawn to pay the same. The amount of the check is charged against Pease in their account with him, and credited to the bank on their account with the bank. Before the check is presented for payment at the bank, an action is commenced by one partner against the other to dissolve the partnership and close up its business. In that action a receiver is appointed and the bank has notice of such appointment before the check is presented, and thereupon the bank declines to pay the check until the right of the receiver and the check-holder is determined by the court, and it retains in its possession the money due the firm without objection by the firm or the receiver, until such determination can be had. No demand for the money is made upon the bank by the firm or the receiver, and so far as appears from the evidence the credit to the bank for the amount of the check remains, as well as the charge of the same amount to Pease, on the books of the firm. So far at least as Davis is concerned, he appears willing that the money should be paid to Pease or to his assignee, if he have one, if the note Pease agreed to surrender to him when the check was given be surrendered and cancelled. This was done at the hearing of the order to show cause, so that the only objection Davis had to the payment of the money to Pease or his assigns was removed at the hearing.

I do not understand that the commencement of the action to dissolve the partnership, and the appointment of a receiver in that action was in itself a revocation of the order upon the bank to pay the money to the holder of the check, and that if the bank had

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paid the check after a simple notice that a receiver had been appointed, without any direction on his part to the bank not to pay the check, the bank would have paid it in its own wrong, and have been liable for the amount so paid, either to the receiver or the firm. The receiver in such an action takes possession of the property of the firm for the benefit of the members of which it is composed, and not primarily for the benefit of the creditors of the firm.

Notwithstanding the absence of any direct evidence in the record upon the question, we think it may be fairly inferred, that upon the hearing of the order to show cause, the receiver made claim to the whole credit due from the bank to the firm, and resisted the payment of the check to the holder; but it does not disclose that any such claim was made by the firm or either of the members thereof. However that may be we shall treat the question as though the receiver had the right, even as against the wishes of the members of the firm, to demand the payment of the amount due from the bank to him, and that such demand on his part must have the same effect in the law as though made by the firm or the members thereof.

We come back to the question stated above. As between the holder of a check for value and the drawer thereof, the bank upon which the check is drawn standing indifferent, and the drawer having an account to his credit in the bank sufficient to pay the same, is the check-holder entitled in equity to have the money paid to him to the amount of his check, or may the drawer arbitrarily stop its payment and compel the bank to pay the money to him?

As a question of morality there can be no doubt as to the injustice of permitting the drawer to prevent the payment of his check. When he gave the check to Pease, it was with the implied if not express assurance that he had a credit at the bank upon which his check was drawn sufficient to pay it, and that the bank would pay it on presentation, and that he would not himself do any act to prevent the bank from paying the same on presentation. Without this express or implied assurance on the part of the drawer of the check, it cannot be presumed Mr. Pease would have taken it upon the settlement of his claim against the drawer. Relying upon this assurance on the part of the drawer, he received the check, and it seems to us very clear that upon equitable principles the drawer is estopped from stopping its payment except for some good cause, and that if he does so arbitrarily he is guilty of a fraud which a

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court of equity will not sanction. But in this case the drawer did something more than merely giving his check to Pease for the amount due him; he charged Pease with the amount of the check and credited the bank with the payment thereof, and such charge and credit remain on the books of the firm apparently up to the present time. He has therefore, so far as he could without the consent of the bank, appropriated so much of the debt due him from the bank as is necessary to the payment thereof, to such payment; and the bank not objecting to such appropriation, there can be no equity in now allowing the drawer of the check to withdraw such appropriation without showing some reason for so doing. The bank not objecting, we think it is the plain duty of a court of equity to direct the payment of the check out of the funds in the bank to the credit of the drawer.

Upon this question courts have differed in opinion, but we think both reason and authority are in favor of the rule above stated. *Risley v. Phenix Bank*, 83 N. Y. 318, 328; s. c., 38 Am. Rep. 421; *Coates v. First Nat. Bank*, 91 N. Y. 20; *Walker v. Seigel*, 2 Cent. L. J. 508; *German Savings Inst. v. Adae*, 1 McCrary, 501; s. c., 8 Fed. Rep. 106; *Wheatley v. Strobe*, 12 Cal. 92, 97; *Harker v. Anderson*, 21 Wend. 372, 381; *Ex. Bank v. McLoon*, 73 Me. 498; s. c., 40 Am. Rep. 388; *Bell v. Alexander*, 21 Grat. 1, 6; *In re Brown*, 2 Story C. C. 502, 519; *Yeates v. Groves*, 1 Ves. Jr. 281; *Lett v. Morris*, 4 Sim. 607; *Row v. Dawson*, 1 Ves. Sr. 331; *Pope v. Huth*, 14 Cal. 407; 2 Dan. Neg. Inst., § 1638; 1 Dan. Neg. Inst., § 23; *Morse Bank*, 459, 474; *Byles Bills* (7th ed.), 14, and note; 1 Story Eq. Jur. 1040; *Story Prom. Notes*, § 498, note 3. These authorities we think fully establish the rule that as between the drawer of a check and the holder thereof for value, the drawing and delivery of the check operates as an equitable assignment of the account or fund upon which it is drawn, to the amount of the check, and as a consequence such equitable assignment is binding upon the drawer, and he cannot avoid it except for some good cause. All the learned authors and judges speaking upon the subject say that it is a fraud on the part of the drawer of the check to make the same, when he knows he has no credit or fund to draw upon, and that it is equally a fraud, as between him and the person to whom he gives the check for value, to withdraw the fund or credit before the check is presented for payment. Daniel in his work on Negotiable Instruments, says:

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“As between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt, and if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his whole debt in its entirety at once. But if the payee goes into equity, or if the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment of the drawer or by legal process served upon the drawee.” § 23, p. 20; *Yeates v. Groves*, 1 Ves. Jr. 280; *Lett v. Morris*, 4 Sim. 607; *Bradley v. Root*, 5 Paige, 632; *Marine & F. Ins. Bank v. Jauncey*, 1 Barb. 486; *Harris v. Clark*, 3 N. Y. 93, 120; s. o., 51 Am. Dec. 352; *Cutts v. Perkins*, 12 Mass. 209. See 3 Lead. Cas. Eq. (3d Am. ed.), 356.

The reason of this rule is that while the debtor cannot be subjected to several actions by several parties to recover one debt due to an assignor who has assigned the debt to several indistinct parts, without his assent, in equity all the parties entitled to the whole debt due from the debtor are before the court, and he is subjected to but one action for the whole debt, and the rights of all the parties are settled in one action. The objection therefore to splitting up the claim is obviated, and there is no reason why the several assignees of the debt should not have their rights settled in such equitable action. All parties entitled to any part of the debt due from the bank to the firm, or the receiver of the firm being before the court, and the bank standing indifferent, and willing to pay to such party or parties as the court shall direct, it seems to us that it would be contrary to a fundamental rule of equity to permit the drawer of the check to prevent the appropriation of the fund in the bank for that purpose, when such act on his part would be a fraud upon the holder of the check.

We are of the opinion that the County Court should have either directed the payment of the amount of the check to the petitioner, Joseph M. Pease, or have directed the bank to hold the same until such time as the right to the same, as between Pease and the Mechanics' National Bank of New York as garnishee, should be determined, and in case it was determined that such bank was entitled to the money, as against Pease, then have directed the money to be paid to such bank.

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We are aware that there are decisions of courts of high authority which are in conflict with the rule above stated; but I think, as is well stated by the learned judge who decided the case of *German Savings Inst. v. Adae*, 1 McCrary, 501; s. c., 8 Fed. Rep. 106, that "there is certainly no good ground for holding that a check drawn upon a fund in bank is not an equitable assignment as between the drawer and payee, and in a case where there is no controversy as to the rights of the bank or drawee, it does not lie in the mouth of the drawer or his assignee to say that such an instrument is not an equitable assignment."

BY THE COURT. The order of the County Court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Judgment reversed.

NOTE BY THE REPORTER.—Daniel (Neg. Inst., § 1638), says: "As between the drawer and payee (or holder) there is no doubt that the delivery of the check constitutes an assignment of the amount." • And section 1643: "We have seen already that a check operates as an assignment of the fund on which it is drawn, *pro tanto*, from the very time it is drawn and delivered, as between the drawer and the payee or holder."

"When a party draws a check upon a bank, he appropriates and dedicates the amount of the check to the use of the drawee; and we take it to be clear that the drawer engages that at the time when the check is due and payable, he has and will have then, and at all times thereafter, sufficient funds in bank to pay the same upon presentment, for by the draft he appropriates those funds absolutely for the use of the holder. If he withdraws the funds, he is guilty of a manifest wrong in thus subtracting the very funds already appropriated to the payment of the check."

See *Compton v. Gilman*, 19 W. Va. 312; s. c., 42 Am. Rep. 776; *Fletcher v. Pierson*, 69 Ind. 281; s. c. 35 Am. Rep. 214; *Emery v. Hobson*, 62 Me. 538; s. c., 16 Am. Rep. 518.

Williams v. Williams.

WILLIAMS V. WILLIAMS.

(88 Wis. 58.)

Marriage — presumption — estoppel by divorce.

J. took R. to wife in 1860, and very soon permanently deserted her. In 1864 J. married the plaintiff. In 1868 J. and the plaintiff separated. In 1870 while living near J. the plaintiff publicly married W. Subsequently the plaintiff got a divorce against J. by default for desertion. *Held*, in this action for dower in the estate of W., (1) that the presumption was against the validity of the marriage of 1864; (2) that the plaintiff was not estopped from showing that that marriage was void.

EJECTMENT for dower. The head-note states the case. The defendant had judgment.

Charles Quarles, for appellant.

Fish & Dodge and *D. S. Wey*, for respondent.

CASSODAY, J. Was the marriage between the plaintiff and Lewis Williams, Sr., legal and binding upon the parties at the time it was consummated, on May 9, 1870? The answer to this question must be in the affirmative, unless the plaintiff was at the time the wife of William Jones. If she was at the time the wife of Jones, then she was incapable of entering into the marriage contract with Lewis Williams, Sr. § 2330, R. S. The statute expressly prohibits such second marriage. § 2330, R. S. It goes further and declares that "if solemnized within this State," as this was, it shall "be absolutely void, without any judgment of divorce or other legal proceedings." § 2349, R. S. Whether the plaintiff was at that time the lawful wife of Jones depends upon whether the marriage between them in Wales, June 13, 1864, was a legal marriage. It is a verity in the case that four years prior to that marriage Jones had been lawfully married to Amelia Rees, who was then still living, and who continued to live for at least three years after the commencement of this action. It is claimed that the trial court was bound to presume, in the absence of testimony, that the marriage between Jones and Amelia, April 6, 1860, had been dissolved prior to his marriage with the plaintiff. The finding of the trial court to that effect is based entirely upon that presumption. There is no

claim or pretense that there is in the record any evidence of any such divorce, except the alleged presumption arising from the fact that Jones married the plaintiff. It is claimed that this alleged rule of presumption is settled by the authorities conclusively, and beyond all question. Several cases are cited in the brief of counsel in support of this statement. Some of these cases will be considered.

The leading case cited is *King v. Twynning*, 2 Barn. & Ald. 386. That case is cited in support of several of the other cases cited by counsel, as in *Yates v. Houston*, 3 Tex. 449; *Carroll v. Carroll*, 20 Tex. 741; *Harris v. Harris*, 8 Bradw. 65; *Blanchard v. Lambert*, 43 Iowa, 230; s. c., 22 Am. Rep. 245. In *King v. Twynning*, the question was whether the pauper Mary Burns was then the lawful wife of Francis Burns. It appeared that about seven years before she had married Richard Winter, with whom she lived a few months, when he enlisted as a soldier and went abroad on foreign service, and had never thereafter been heard of. A little more than a year after his departure, Mary married Francis Burns, by whom she had children, and with whom she continued to live. In favor of innocence, the court presumed that Winter was dead before Mary married Burns. A person who has not been heard of for seven years is presumed to be dead, but there is no legal presumption that the death occurred at the end of the seven years, nor at any precise time during the seven years. *Doe v. Nepean*, 5 Barn. & Ad. 86.

In *King v. Harborne*, 2 Ad. & E. 540, one Henry Smith had married the pauper, Ann Smith, April 11, 1831, and then deserted her. It appeared also that he had married Elizabeth Meadows, October 4, 1821, and continued to live with her about four years, when he left her, and she went to the hospital, and a letter was produced from her, dated in Van Dieman's land twenty-five days before Smith married Ann. In that case it was held that the sessions were authorized to presume that the first wife was living at the time of the second marriage. In giving the opinion of the court, Lord DENMAN, C. J., in speaking of *King v. Twynning*, *supra*, said this court in that case "merely decided that the case raised no presumption upon which the findings of the sessions could be disturbed. The two learned judges writing the opinions certainly appear to have decided the case upon more general grounds. The principle however upon which they seem to have proceeded

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was not necessary to that decision. I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such a question of fact without reference to accompanying circumstances; such for instance as the age or health of the party. There can be no such strict presumption of law. * * * I think that the only questions in such cases are what evidence is admissible, and what inference may fairly be drawn from it." LITTLEDALE, J., expressed himself of the same opinion, and said: "All these questions depend upon the facts. There can be no direct evidence as to the fact, unless the party be shown to be alive after the marriage." All the judges concurred. In that case there was no evidence tending to show any divorce from Elizabeth, and no intimation that the court had any right to presume such divorce.

Several years afterward the House of Lords, after considering both of the above cases, and in opinions delivered by Lord Chancellor COTTENHAM and Lords CAMPBELL and BROUGHAM, declared substantially the same rule, and held that "there is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offense against the law. In every instance the circumstances of the case must be considered." *Lapsley v. Grierson*, 1 H. L. Cas. 498. The question there involved was the legitimacy of Robert Lapsley and his sister Joanna, born in 1807 and 1810, and whose parents were John Lapsley, who died in 1810, and Janet McKinley, who was alleged to have been his wife. In behalf of Robert and Joanna it was claimed that their mother Janet McKinley had been married three times in Scotland; first to Kidd, who died in 1796; secondly to Paul, who left for America in 1801 and was lost at sea in 1804 or 1805, and thirdly, to their father, John Lapsley, in 1807. The first two marriages were admitted, but the third was denied, and it was alleged that the cohabitation commenced unlawfully soon after Paul's departure from Scotland, and so continued without its character having been changed, until the death of the father, John Lapsley, in 1810. "To make such children legitimate, it was held necessary for those who asserted their legitimacy to prove either a legal origin of the cohabitation or a change in the nature of it after the death of Paul had become known to all the parties. The mere fact that John Lapsley and the woman Janet McKinley continued to live together

was not sufficient for that purpose. Under the circumstances the children were held illegitimate, though born after the date of Paul's death." But there is no intimation in the case of any presumption of any divorce of Paul and Janet McKinley in order to sustain the innocence of her and John Lapsley, and thus legitimize the children.

Of course where there has been a marriage ceremony, it is *prima facie* valid, for the law presumes in favor of marriage. *Piers v. Piers*, 2 H. L. Cas. 331. In the recent case of *Reg. v. Willshire*, 6 Q. B. Div. 366; s. c., 29 Eng. Rep. 660, the indictment charged the prisoner with having married Charlotte Lavers, September 7, 1879, and then, while she was still living, having feloniously married Edith Miller, September 23, 1880. These charges having been clearly proved, the prisoner, to prevent conviction on that indictment, himself proved that he had been convicted of bigamy in June, 1868, on an indictment charging him with having married Ellen Earle in 1864, and then, while she was still living, having feloniously married Ada Leslie, April 22, 1868. There was no evidence that Ellen Earle was living September 7, 1879; nor that her marriage with the prisoner in 1864 had ever been dissolved or declared a nullity. The prisoner was convicted, and upon the question reserved, Lord COLERIDGE, C. J., among other things, used this language: "It is said, and I think rightly, that there is a presumption in favor of the validity of this latter marriage (1879), but the prisoner showed that there was a valid marriage in 1864, and that the woman he then married was alive in 1868. He thus set up the existence of a live wife in 1868, which in the absence of any evidence to the contrary will be presumed to have continued to 1879. It is urged in effect that the presumption in favor of innocence—a presumption which goes to establish the validity of the marriage of 1879—rebutts the presumption in favor of the duration of life. It is sufficient to raise a question of fact for the jury to determine. It was for the jury to decide whether the man told and acted a falsehood for the purpose of marrying in 1879, or whether his real wife was then dead." Because the determination of the fact as to whether she was then living or dead, from these conflicting presumptions, was withdrawn from the jury, the court were unanimous in holding that the conviction could not be sustained. HAWKINS, J., said: "This case depended on a question of fact whether Ellen Earle was alive September 7, 1879, or not. If she was alive, the prisoner was entitled

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to be acquitted; if she was dead, he was rightly convicted. There was proof that Ellen was alive in 1868; there was presumption that her life continued. The only evidence to the contrary was that the prisoner presented himself as a bachelor to be married in 1879. Whether that would have satisfied the jury that his former wife was then dead, was a question for them to decide, but it was not left to them for decision."

The *Dysart Peerage* case, decided in the House of Lords the same month, covered some of the questions before this court on the former appeal, but nothing in conflict with the English rule as to conflicting presumptions above stated. 6 App. Cas. 489; s. c., 34 Moak's Eng. 550. That rule has judicial sanction in this country. *Wiseman v. Wiseman*, 73 Ind. 112; s. c., 89 Ind. 479; s. c., 38 Am. Rep. 115; *Comm. v. Thompson*, 6 Allen, 591; s. c., 11 Allen, 23; *Gorman v. State*, 23 Tex. 646; *Ellis v. Ellis*, 58 Iowa, 720; Best Ev., § 334. The Texas and Iowa cases here cited virtually overrule the prior cases in the same States, respectively, cited by counsel.

Under the rule suggested there is no rigid presumption against the continuance of the life of one of the parties to a prior marriage in order to establish the innocence of the other party to a subsequent marriage; much less is there any rigid presumption of a dissolution of the first marriage by a divorce prior to the second, in order to establish such innocence. *Smith v. Smith*, 5 Ohio St. 32. Probably there are cases in which the facts and circumstances were such as to justify the inference that the former marriage had been dissolved by a divorce; but the rule indicated authorizes no absolute presumption of law to that effect. Each case must be determined upon its own facts and circumstances, and such inferences as should fairly and reasonably be drawn from them. The question whether the plaintiff was lawfully married to Jones, June 13, 1864, must be so determined.

It is confessed that four years before that marriage the same Jones had been married to Amelia in Wales; that he only lived with her about twelve weeks; that during the most of that time they were at the house of Amelia's father; that just before the end of the twelve weeks, and in order to start Jones in business his father gave him £20 and Amelia's father gave him £20 more; that a few days after receiving these gifts, Amelia's husband left the house of her father without saying whither he was going, and

never returned. On his departure Amelia found that he had taken £10½ of her own money. On the next day Amelia and her father went in search of him as far as Liverpool, where they were informed that he had embarked on board a vessel bound for America. Amelia continued to live with her father, or in the vicinity, as late as 1877; but during all that time she never received any paper or letter from her husband, Jones.

The opinion of the court in the Massachusetts case cited, is peculiarly applicable to this state of facts. It is there said: "But the case stated in this bill of exceptions is wanting in one of the essential facts stated as the foundation for a right to presume the death of the husband. It is only to the person who leaves his home or place of residence, and is gone more than seven years and not heard of, that this presumption is applicable. Here the wife went away, and the husband, for aught that appears, remained at Lawrence, or in the vicinity. * * * In the facts stated we see no sufficient ground for any presumption of the death of the husband upon which the wife of Carleton or the defendant could properly have acted." Applying these principles to this case, and it follows that since Jones went to parts unknown to Amelia, and she remained at her father's home where he left her, or in that vicinity, an inference of Jones' death, and possibly of his divorce, might have been fairly drawn from the facts and circumstances in favor of Amelia's innocence, had she got married, yet that no such inference could reasonably be drawn in favor of the innocence of Jones; for as to him he knew where he left his wife, and hence could easily have ascertained the facts. From the facts stated, it cannot fairly be inferred that Jones and Amelia were divorced at any time, much less prior to the time when the plaintiff and Jones were through the marriage ceremony in 1864. On the contrary, we must infer that no such divorce was ever obtained.

In addition, it appears that the plaintiff and Jones separated in 1868, or 1869, while living in Kenosha, and that the plaintiff, near where Jones then lived, publicly married Williams, and openly lived with him there as her husband. These facts of themselves, raise an inference against the validity of the marriage of 1864. *Jones v. Jones*, 48 Md. 391; s. c., 30 Am. Rep. 466; *Weatherford v. Weatherford*, 20 Ala. 548; s. c., 56 Am. Dec. 203. These things, in connection with the other facts and circumstances stated, force upon us the conviction that Amelia was the lawful wife of Jones at

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the time he went through the marriage ceremony with the plaintiff. This being so, that marriage had it been consummated in this State, would have been absolutely void without any judgment of divorce or other legal proceeding, under the statutes above cited, which were in force at the time. R. S. 1858., § 3, chap. 109, and § 1, chap. 111. The same would be true in respect to that marriage, if we are to presume, as claimed, that the law in Wales at the time was the same as our own. There are decisions authorizing such presumption. In addition to those cited by counsel, see *Hynes v. McDermott*, 82 N. Y. 41; s. c., 38 Am. Rep. 538; *Comm. v. Kenney*, 120 Mass. 387. The question however becomes immaterial here, for if that presumption is not to be indulged, then the common law must be deemed to have been in force in Wales, and since Amelia was the lawful wife of Jones at the time of his alleged marriage with the plaintiff, he was thereby disabled, and rendered absolutely incapable at common law of effecting a valid marriage with the plaintiff, and the attempt to do so by the marriage ceremony in question was a nullity, absolutely and *ab initio*. *Lady Madison's case*, 1 Hale, P. C. 693; *Riddlesden v. Wogan*, Cro. Eliz. 858; *Hemming v. Price*, 12 Mod. 432; *Rex v Penson*, 5 Car. & P. 412; *Regina v. Brawn*, 1 Car. & K. 144; *Heffner v. Heffner*, 23 Penn. St., 104; *Smart v. Whaley*, 6 Smedes & M. 308; *Martin's Heirs v. Martin*, 22 Ala. 86; *Rawdon v. Rawdon*, 28 Ala. 565; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Glass v. Glass*, 114 Mass. 563; *Tefft v. Tefft*, 35 Ind. 44; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. 113; *In re Shaak's Estate*, 4 Brewst. 305; *Patterson v. Gaines*, 6 How. 550; *Halbrook v. State*, 34 Ark. 511; s. c., 36 Am. Rep. 17; *State v. Goodrich*, 14 W. Va. 834; *Higgins v. Breen*, 9 Mo. 497; *Johnson v. State*, 61 Ga. 305; *People v. Brown*, 34 Mich. 339; *Gathings v. Williams*, 5 Ired. L. 487; s. c., 44 Am. Dec. 49, and notes.

The marriage between the plaintiff and Jones being absolutely void *ab initio*, it was good for no legal purpose, and its invalidity may be maintained in any proceeding in any court between any parties, whether in the life-time or after the death of the supposed husband or wife, or both, and whether the question arises directly or collaterally. 1 Bish. Mar. & Div. (6th ed.), § 105, and cases there cited; 2 Greenl. Ev., § 464. It is otherwise where the marriage is voidable merely. 2 Greenl. Ev., § 464; *Gathings v. Williams*, 5 Ired. L. 487. Since Jones was the lawful husband of

Amelia from the time of their marriage in 1860, until long after the commencement of this action, it follows that he could not during any portion of that time be the husband of the plaintiff. Since during that time he was not her husband, she could not be his wife. The plaintiff not having been legally married to Jones prior to May 9, 1870, was free at that time to marry Williams, unless the mere fact of such prior illegal intercourse with Jones was an impediment to such marriage. But such illegal intercourse, even though it had been fraudulently concealed by her from Williams before their marriage, would not, on discovery, have been ground for divorce from her at the suit of Williams, much less an impediment to their marriage. *Varney v. Varney*, 52 Wis. 120; s. c., 38 Am. Rep. 726. It follows that the plaintiff and Williams were lawfully married May 9, 1870, and thereupon became husband and wife, with all the rights and obligations on the part of each incident to that relation.

That marriage having been lawful and binding upon Williams and the plaintiff at the time it was consummated, followed by cohabitation during the life of Williams, with no divorce from each other intervening, it would seem to follow that the plaintiff is the lawful widow of Williams, with all the rights incident to that *status*. But it is urged with much learning, ability and plausibility, in effect, that notwithstanding the plaintiff was the lawful wife of Williams from May 9, 1870, to the time of his death, and that Jones during the same period was the lawful husband of Amelia, yet that as the plaintiff, six months after her marriage with Williams, brought an action of divorce against Jones on the ground of his alleged desertion, and obtained a judgment therein, she is thereby forever estopped in any and all courts, and in whatever form the question may arise, from maintaining that she was never the lawful wife of Jones, or that she was ever the lawful wife of Williams. Is this the law? The question is novel, and for that reason, among others, is entitled to careful consideration, and besides, it is not free from difficulty. We agree with counsel that it was not decided upon the former appeal. The effect of such divorce, on the assumption that the plaintiff had been lawfully married to Jones, was there however expressly reserved for more "thorough examination," by reason of its being "one of such grave importance to the public, and so far-reaching in its effects upon the rights of persons not parties to the action for divorce," and because the case, as then

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presented, was necessarily reversed for a refusal to give proper instructions to the jury. 46 Wis. 474.

In determining the question, there must be no infringement of any of the established rules as to the conclusiveness of judgments, or their estoppel, as evidence. It was in effect determined by the judges, unanimously, on the trial of the duchess of Kingston, more than a hundred years ago, (1) that the judgment of a court of concurrent jurisdiction, directly upon the point involved, was conclusive between the same parties upon the same matter directly in question in another court; (2) that the judgment of a court of exclusive jurisdiction directly upon the point involved was in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. *Rex v. Duchess of Kingston*, 20 How. St. Tr. 538. Of course, such judgments upon such questions, and between such parties and their privies, are conclusive. *Miltimore v. Miltimore*, 40 Penn. St. 551; *Caujolle v. Ferrie*, 13 Wall. 465. But in the *Duchess of Kingston's* case the judges were equally unanimous in stating as exceptions to those rules, that no judgment "is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment." These exceptions have frequently received the sanction of the courts. *Louis' Appeal*, 67 Penn. St. 165; *Bennett v. Holmes*, 1 Dev. & B. 487; *Caujolle v. Ferrie*, 13 Wall. 469; *Brown v. Brown*, 37 N. H. 537; *Hunter v. Davis*, 19 Ga. 413; *Church v. Chapin*, 35 Vt. 224.

The complaint in the divorce suit alleged that the plaintiff and Jones were duly and lawfully married in Wales, and that he willfully deserted her in 1868. Jones let the case go by default. The court found the allegations of the complaint to be true, and as conclusion of law that the plaintiff was entitled to a degree of divorce from the bond of matrimony, which was granted. Certainly the desertion was the principal question involved and determined therein. That question however is not involved in this case. Of course, the fact of marriage was incidentally cognizable. The defendant having made default, the plaintiff was not required to prove the marriage. *Fox v. Fox*, 25 Cal. 587; *Hill v. Hill*, 2 Mass. 150. But even had it been denied, the plaintiff would have made a *prima facie* case by proving the marriage ceremony at Newtown, June 13, 1864. Certainly she was not bound to go further, and

prove that there were no impediments to the lawfulness of that marriage. *Harman v. Harman*, 16 Ill. 85; *Huston v. Huston*, 63 Me. 184. True, the complaint alleged that they were "duly and lawfully married." The default was a confession by Jones that they had been married, and perhaps "duly" married. But the lawfulness of that marriage could not be established by such confession, nor by the plaintiff's allegation. Being incapable of contracting the marriage relation by reason of Jones having a former wife living at the time, they were equally incapable of establishing its lawfulness by such allegation and confession. The same inability which prevented the marriage ceremony from being effectual for any purpose was equally potent to prevent its lawfulness being established by the declarations or confessions of either of the parties to it. The allegation in the complaint as to the lawfulness of the marriage was a mere conclusion of law from the fact of marriage therein alleged. The allegation of a mere conclusion of law cannot be treated as an allegation of an issuable fact. *Pratt v. Lincoln Co.*, 61 Wis. 62. It follows that the finding of the court, that each and every allegation of the complaint, was true, must be confined to the facts therein stated, and cannot be extended to the conclusions of law therein alleged.

The invalidity of that marriage did not depend upon any of the facts or circumstances stated in that complaint, but upon facts wholly outside and entirely independent of any thing therein stated. Since the invalidity of that marriage depended entirely upon facts *dehors* the complaint in the divorce suit, and since Jones made no answer setting up such facts or otherwise, it is evident that the validity of that marriage was not involved in that suit, and hence could not be therein determined. There is nothing in the record indicating that the court undertook to determine that question. True, as already suggested, the fact of marriage was incidentally cognizable. The decree of divorce from the bond of matrimony presupposed the relation of husband and wife, and consequently a previous marriage. So the four years' cohabitation presupposed a previous marriage, and the marriage ceremony presupposed the capacity to marry. But the question is whether any or all of these things precluded the plaintiff in this action from showing by facts *dehors* the divorce record that there was at the time of the alleged marriage no capacity on the part of Jones to contract any marriage with the plaintiff or any one by reason of his being at the

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time the husband of another woman. Of course there is an inconsistency in speaking of two persons being divorced from the bond of matrimony when in law no such bond ever existed between them; but it is no more inconsistent than to speak of such persons being married, when in law there could be no such marriage. There was a marriage ceremony, but in law no marriage. There was in form the dissolution of such marriage, when in law none existed. The divorce record was admissible in evidence as a confession of marriage by the plaintiff, but it was not necessarily conclusive. 20 How. St. Tr. 540; *Parsons v. Copeland*, 54 Am. Dec. 628; *Halbrook v. State*, 34 Ark. 511; s. c., 36 Am. Rep. 17; *State v. Goodrich*, 14 W. Va. 834.

The legality of the marriage was at most a "matter incidentally cognizable" in the divorce suit, and merely "inferable by argument from the judgment," and hence was an exception to the rules of conclusiveness already mentioned. In the case in *Croke*, Elizabeth, cited, the defendant, a female, was sued upon a bond. She pleaded in effect that at the time of making the bond she was the wife of John Inglebert, who was still living, and hence that she was not bound. The plaintiff replied in effect that at the time of the alleged marriage Inglebert had another wife living, and that after the making of the bond there was a suit in the spiritual court between her and Inglebert wherein the marriage between them was by sentence adjudged void and to be null. This replication was held good on demurrer, on the ground that the judgment was simply declaratory of a void marriage, "and therefore there needed not any such sentence of divorce, for it was void *ab initio*, and she always sole." In the *Duchess of Kingston's* case, one of the questions put to the judges was "whether a sentence of the Spiritual Court against a marriage, in a suit for jactitation of marriage, is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy." 20 How. St. Tr. 537. This question was answered in the negative. Page 544. The trial proceeded and the lords were unanimous in finding the duchess guilty of bigamy, notwithstanding the sentence of the Spiritual Court, having exclusive jurisdiction, against the validity of the first marriage on the ground of nonage. 20 How. St. Tr. 623-625. This of course was upon the ground that the case did not come within either of the rules stated, but within the exception stated. In that case the

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question of the legality of the marriage had been directly passed upon by the Spiritual Court, but it was not conclusive in the prosecution for bigamy. Estoppels, to be binding, must be mutual, and this doctrine is not confined strictly to mere actions *in personam*. *Chandler's Appeal*, 100 Penn. St. 262; *Gwynn v. Hamilton's Adm'r*, 29 Ala. 233; *Bradley v. Briggs*, 55 Ga. 354; *Roach v. Garvan*, 1 Ves. Sr. 157; *Burlen v. Shannon*, 3 Gray, 387. Therefore a person who is not himself bound by a judgment cannot set it up against another.

It is difficult to see how Lewis Williams could have been bound by the divorce; and if he could not, then certainly the defendant cannot. But there is another reason why that decree of divorce is not conclusive on the plaintiff in this action. It was not instituted for the purpose of determining the validity of the marriage. On the contrary it assumed the validity of the marriage, and sought the dissolution thereof. The institution of such a suit naturally raised an inference of the validity of the marriage. But this inference was not strengthened by the nature of the decree rendered. In fact the inference would have been equally strong, and even stronger, had the court denied the divorce. In such a suit, and without any allegations of fact showing the invalidity of the marriage, it would seem that the court had no authority to determine its validity or invalidity, even had it attempted to do so. The only power the court possessed to grant any divorce was such as was given by the statutes. *Barker v. Dayton*, 28 Wis. 367; *Hopkins v. Hopkins*, 39 Wis. 167; *Bacon v. Bacon*, 43 Wis. 197; *Cook v. Cook*, 56 Wis. 203; s. c., 43 Am. Rep. 706.

Under the statutes "the Circuit Court has jurisdiction of all actions to affirm or annul a marriage, or for a divorce." § 2348, R. S. When the action is for a divorce for any of the causes named in the statutes, it is necessarily upon the assumption that there has been a valid marriage, or one binding at least until adjudged void. But when the validity of the marriage itself is to be determined then the action should be to affirm or to annul the marriage, and the judgment of affirmance or nullity therein is made by statute "conclusive upon all persons concerned." §§ 2348, 2350, 2351, 2352. Such an action is in effect the old suit for jactitation of marriage. Such a suit in a case like this is unnecessary, but is provided for, and of course can be maintained. *Rawdon v. Rawdon*, *supra*; *Glass v. Glass*, *supra*; *Tefft v. Tefft*, *supra*; *Wight-*

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man v. Wightman, supra. No such suit between the plaintiff and Jones was ever commenced, tried or determined. The validity of that marriage could not be tried upon the complaint in the divorce suit filed by the plaintiff and Jones' default. Anonymous, 15 Abb. Pr. (N. S.), 171; § 2886, R. S. The statutes having made a clear distinction between an action to affirm or to annul the validity of a marriage and an ordinary action for a divorce, it follows that an ordinary decree in such action of divorce cannot have the same effect as to the validity of the marriage as a decree in an action for affirmance or annulment. Thus it appears that the validity of the marriage between the plaintiff and Jones was never tried or determined in the divorce suit. Certainly the validity of the marriage between the plaintiff and Williams was never tried in that suit.

The doctrine is familiar that there can be no estoppel any further than jurisdiction of the subject-matter has been obtained. *Cook v. Cook*, 56 Wis. 205-218; s. c., 43 Am. Rep. 106. So there can be no estoppel upon questions not determined, and upon the pleadings not determinable. As we have seen, the marriage between the plaintiff and Jones was absolutely void *ab initio*, without any judgment of divorce or other legal proceeding, and hence the marriage between plaintiff and Williams was valid and binding. Such being the state of the case it would be absurd to hold that the plaintiff is conclusively estopped by the subsequent judgment of divorce from showing that she was never the lawful wife of Jones, but was the lawful wife of Williams. 1 Bish. Mar. & Div. (6th ed.), § 105, and cases there cited; 2 Greenl. Ev., § 464. It follows that the plaintiff is the lawful widow of Lewis Williams, deceased, and as such is entitled to dower in the premises in question, with damages for the withholding thereof from the time of making demand therefor. *Munger v. Perkins*, 62 Wis. 499.

The judgment of the Circuit Court is reversed and the cause is remanded with direction to enter judgment in favor of the plaintiff in accordance with this opinion.

Luebke v. Chicago, Milwaukee and St. Paul Railway Company.

LUEBKE V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(68 Wis. 91.)

Master and servant — negligence — dangerous employment — fellow-servants.

The plaintiff, in the employ of a railway company, went under a car standing alone on a repair track, by order of his foreman, to repair it, and was there injured by the starting of the car by an advancing train. The defendant had provided a watchman to guard the plaintiff from danger. *Held*, that the defendant was not liable for the watchman's neglect of his duty.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

J. W. Cary, D. S. Wegg and Burton Hanson, for appellant.

Charles M. Bice, for respondent.

LYON, J. This case was here on a former appeal by the plaintiff from a judgment of nonsuit, and is reported in 59 Wis. 127; s. c., 48 Am. Rep. 483. That judgment was reversed by a divided court (CASSODAY and TAYLOR, JJ., dissenting) on the ground that it was the duty of the defendant company to provide a watchman to prevent any collision by other cars with that under which the plaintiff was at work, and there was no evidence whatever that the company had performed that duty. The cause has been again tried, and the plaintiff recovered a judgment, from which the defendant appeals.

The testimony on the two trials is substantially the same, except that on the last trial it was abundantly proved — indeed there is no evidence to the contrary — that while the plaintiff was under the car three trainmen in the employ of the defendant were standing by the car, and that it was the duty of each of them, incident to his employment, to act as a watchman to protect the plaintiff from injury.

True, no written or published regulation of the company to that effect was shown; neither did any witness in the employ of the company testify that he had been charged by any officer of the company with the duty of watching for the safety of other employees working under cars upon the tracks; but many such witnesses

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testified that their duty in that behalf was well understood by them and other employees of the company. It was a sort of common law of the company, obligatory upon its employees, and as thoroughly understood by them as though it had been embodied in the printed regulations and read by the officers of the company to them. It thus became a rule or custom of the company, as well as an understanding between its employees.

The jury found that it was not a rule or custom of the company, imposed by it upon its employees, that they should watch for the safety of their fellow-workmen in positions of danger. This finding is the basis of the judgment for the plaintiff, and yet, as we understand the evidence, it is entirely unsupported by the testimony. The undisputed evidence establishes a perfect defense to the action, and the court should have directed a verdict for the defendant, or at least should have granted the motion of the defendant for a new trial.

The case is somewhat voluminous, and a special verdict was taken in the form of answers to twenty-five questions. It is unnecessary to set out the special verdict, or to comment on the details of the case. The decisive question is, did the defendant provide a watchman to guard the plaintiff from danger while at work under the car? As already stated, the undisputed evidence answers this question in the affirmative, and the answer is fatal to a recovery in the action.

BY THE COURT. Judgment reversed, and cause remanded for a new trial.

Judgment reversed.

**CREAM CITY RAILROAD COMPANY V. CHICAGO, MILWAUKEE AND
ST. PAUL RAILWAY COMPANY.**

(68 Wis. 98.)

Contract — "carriage" — car

"Carriage," as an article of freight in a bill of lading, does not include a street railway car.*

ACTION for injuries to a street car in transit. The opinion states the case. The defendant had judgment below.

*See *Isaacs v. Third Ave. R. Co.* (47 N. Y. 124) 7 Am. Rep. 418, note to *Cone v. Lewis*, ante.

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John W. Cary, D. S. Wegg, Burton Hanson, and H. H. Field,
for appellant.

Winfield Smith, for respondent.

TAYLOR, J. This action was brought by the respondent, a street railroad company in the city of Milwaukee, to recover damages for injuries done to a street car while in transit from the city of New York to the city of Milwaukee. The appellants are the carriers who transported the car from New York to Milwaukee. There is no dispute as to the facts. The car was delivered to one of the appellants in New York in good order. When it arrived in Milwaukee, and before the same was delivered to the respondent, it had been injured. A hole was broken in the rear end of the car and the sill was broken and split. The amount of damage done to the car as found by the jury is not in dispute. The respondent obtained judgment in the County Court and the defendants appeal to this court.

The bill of lading upon which the car was transported from New York to Milwaukee is headed as follows:

“Canada Southern Line.—Fast Freight Line.—From New York, Boston and all New England points to the west, north-west and south-west, through without transfer in cars of this line. Marks: Cream City R. Co., Milwaukee, Wis. (Canada Southern Line.) Bill of lading from New York to Milwaukee depot. No. 413 Broadway, New York, December 2, 1882. Received from John Stephenson Company (limited), in apparently good order (except as noted), the following packages (contents and value unknown) marked as in the margin, viz.: Two (2) new street cars on wheels, Nos. 61 and 63, covered, fixtures packed inside. Both loaded on one (1) flat car. Estimated weight, 20,000 lbs. To be forwarded to Milwaukee, Wis. It being expressly understood that in consideration of issuing this through bill of lading and guaranteeing a through rate, the Canada Southern Line reserves the right to forward said goods by any railroad line between point of shipment and destination, and under the following conditions:

[Here follow several conditions, none of which are material in the determination of this case, except the following:]

“Carriages and sleighs, eggs, furniture, looking-glasses, glass and crockery ware, acids, machinery, stoves and castings, rough

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marble, musical instruments, liquors put in glass or earthen ware, and all other frail and brittle articles, fruit and all other perishable goods will only be taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed in writing to the contrary. * * * The acceptance of this bill of lading or receipt for goods made subject to the conditions of this bill of lading makes this an agreement between the Canada Southern Line and carriers engaged in transporting said goods and all parties interested in the property."

It is claimed by the learned counsel for the appellants that under this bill of lading the carriers are not liable for any injury done to the plaintiff's street car while in transportation unless it be affirmatively established by the evidence that the injury was occasioned by the negligence of the carriers, or some one of them, or of their agents or servants. This claim for exemption from liability on the part of the appellants is based wholly on the clause in the bill of lading above quoted; and it is insisted that there was no evidence given on the trial which tended to prove that the injury to the car was caused by the negligence of the carriers or of their servants, agents or employees.

It is claimed by the learned counsel for the appellants that a street railroad car is a "carriage," within the meaning of that word as used in said bill of lading, and therefore the carriers are not liable for the injury to the same, except upon clear proof of negligence on their part causing the injury. The law seems to be settled that a common carrier may by express contract limit his liability as such carrier; and when he has so limited his liability, he can only be held liable for a loss of goods intrusted to his charge, or for injury to the same while in his possession, upon proof that the loss or injury was the result of the negligence of himself, his agents or employees.

In construing contracts limiting the liability of common carriers, the provisions of the contract are not to be construed liberally in favor of the carriers. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 322, and cases cited in brief of the respondent. Under this rule we are clearly of the opinion that the word "carriage," as used in said bill of lading, when considered in connection with the other things from which exemption from liability is sought by the carrier, cannot, except by the most enlarged construction, be held to include a street railroad car. The carriers in this same bill

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of lading call this thing, which is said to be a "carriage" within the ordinary meaning of that word, a "street railroad car on wheels." They do not designate it as a railroad "carriage," but a "car." To the ordinary mind, in this country at least, the word "carriage" alone does not convey the idea of a railroad car, or of a street railroad car, nor does it even convey the idea of a wheeled vehicle used for the transportation of merchandise or products used in ordinary business. The idea conveyed is a vehicle used for the transportation of persons either for pleasure or business, and drawn by horses or other draught animals over the ordinary streets and highways of the country, and not cars used exclusively upon railroads or street railroads expressly constructed for the use of such cars. As yet in this country the vehicles used for the transportation of passengers on railroads and street railroads are generally called cars, and occasionally coaches, seldom, if ever, "carriages." The definition given by the older lexicographers of the word "carriage" was of the most general and indefinite kind, but that given by those writing in our own times is more in consonance with the restricted and more definite meaning of the word as understood by people in general.

Johnson, in his dictionary, dating back 130 years, defines the word "carriage" as "a vehicle;" "that in which any thing is carried." In later years Worcester defines it as "any vehicle on wheels; especially a vehicle of pleasure, or for the conveyance of passengers." Webster, as "that which carries or conveys on wheels; a vehicle especially for pleasure or for passengers; sometimes for burdens, as a close-carriage, a gun-carriage." In the Imperial Dictionary, which is the latest authority, "carriage" is defined as "that which carries, especially on wheels; a vehicle. This is a general term for a coach, chariot, chaise, gig, sulky or other vehicle on wheels—as a cannon-carriage on trucks, a block-carriage for mortars, and a truck-carriage. Appropriately the word is applied to a coach, and carts or wagons are rarely called carriages." If the definition given by Johnson was the true definition of the word in his time, it will be seen by a reference to the definition in the Imperial Dictionary that its common and ordinary meaning has been restricted to those vehicles which are used for the carriage of persons, such as a coach, etc., and does not include those wheeled vehicles which are used for the carriage of burdens only, such as wagons or carts, and most clearly does not include railroad cars,

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which can be used only on roads properly constructed for their use. Neither Webster, Worcester nor the Imperial Dictionary mentions railroad cars as coming within the common and ordinary meaning of the word carriage.

It is undoubtedly true that the word "carriage" might sometimes be construed to include railroad cars and other vehicles not coming under the denomination of coach, chaise, chariot, gig or sulky. The meaning to be given a word which may be used to designate a variety of things must in all cases depend upon its associations and the subject-matter in relation to which it is used. The association in which the word is found in the bill of lading in question in this case, to our minds, clearly points to a meaning which excludes the idea of a railroad car or street railroad car. All its associates are things either fragile in their nature, or such as are easily damaged by exposure or perishable. Railroad and street cars are not the natural associates of the other articles mentioned in the exemption clause. We must therefore hold that the street car which was injured in this case was not a carriage within the meaning of the bill of lading, and so the plaintiff was entitled to recover upon proof of the injury while in the possession of the defendants as common carriers.

[Minor points omitted.]

By the COURT—The judgment of the County Court is affirmed.

Judgment affirmed.

HÖGER V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(63 Wis. 100.)

Carrier — baggage — merchandise.

A railway company is liable as an insurer for the loss of sample-trunks of a travelling salesman, accepted by it as baggage, when it knew their contents; but only for a reasonable time after reaching the destination.*

ACTION for baggage burned. The head-note and last paragraph of the opinion show the facts. The defendant had judgment below.

* See *Blumantle v. Fitchburg R. Co.* (127 Mass. 822), 84 Am. Rep. 876.

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Johnson, Rietbrock & Halsey, for appellant.

John W. Cary, D. S. Wegg, and Burton Hanson, for respondent.

CASSODAY, J. Which party must suffer the loss of the trunks and their contents, upon the facts stated? The counsel for the plaintiffs frankly concedes that if the trunks and their contents are to be regarded as baggage, and the stringency of the defendant's liability, after the trunks arrived at Hastings, is to be no greater than in the case of ordinary baggage, then that there can be no recovery. With equal frankness the counsel for the defendant concedes that if the trunks and their contents are to be regarded as freight, and the stringency of the defendant's liability, after the trunks arrived at Hastings, is to be the same as in the cases of ordinary freight, then that the defendant is liable. The learned counsel on both sides assert that there is no reported case involving the precise question here presented. With faith in the fidelity of their research, and a clear conviction as to what the law in such cases ought to be, and as we think, is, we have made no attempt to examine through the multitude of cases bearing upon the question, in verification of their assertion. Had the defendant failed to deliver the trunks at the depot in Hastings, and had they been destroyed in transit, or carried elsewhere and lost, then the defendant might have been liable for their value as a common carrier.

Dilg having engaged the defendant to transport the trunks as his baggage, and the defendant, knowing their contents, having received and checked them as his baggage, and Dilg and the trunks having been carried from Red Wing to Hastings on the same passenger train, we must, under the facts stipulated and found, hold that both parties were by their contract conclusively estopped from claiming that the trunks were not to be carried as baggage, or that they were not to be received, treated, and cared for on their arrival at Hastings as baggage, and not as ordinary freight. In one portion of the opinion in the recent case of *Texas, etc., R. Co. v. Capps*, 23 Am. Law. Reg. 377, not cited by counsel, this proposition is asserted so far as estopping the railroad company. But it is well established that estoppels, to be binding, must be mutual.

Under that contract the defendant was bound to safely carry the trunks and their contents to the passenger depot at Hastings, and there place them upon the platform or other customary place of

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delivery, and keep them there for a sufficiently reasonable length of time for the duplicate checks to be presented and the trunks claimed. *Patscheider v. G. W. R. Co.*, 2 Exch. Div. 153; *Dinny v. N. Y. & N. H. R. Co.*, 49 N. Y. 546; *Quimit v. Henshaw*, 35 Vt. 605; *Hutch. Carr.*, §§ 707-710; *Thomp. Carr.*, notes, p. 534, § 22. It stands confessed that this duty of the defendant was fully performed. Being performed, its duty as a common carrier of baggage ended, and its duty as a bailee for hire or a warehouseman began. *Hutch. Carr.*, §§ 707-710; *Thomp. Carr.*, notes, pp. 534, 535, § 23; *Roth v. B. & S. L. R. Co.*, 34 N. Y. 548; *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush, 184; *C., R. I. & P. R. Co. v. Boyce*, 73 Ill. 510; a. c., 24 Am. Rep. 268; *Texas, etc., R. Co. v. Capps*, *supra*. That duty required the defendant to then place the trunks in a proper and suitable baggage-room, and then exercise ordinary care and diligence in safely keeping them there. These things were done. The destruction by fire being without the fault or negligence of the defendant, there was no liability.

BY THE COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

McLAUGHLIN V. WINNER.

(68 Wis. 120.)

Executor and administrator — action on their own contracts — counter-claim.

In an action by an administrator on a contract made with him in that capacity, the defendant may not set-off or counter-claim a demand due from the intestate to him.

ACTION for money received for and goods sold by the plaintiff, as administrator. The opinion states the point. The plaintiff had judgment below.

Geo. B. Goodwin and W. H. Austin, for appellant.

Flander & Bottum, for respondent.

TAYLOR, J. The only material question in this case is the one raised upon the rejection of all evidence on the part of the defendant tending to prove the allegations of the defense or of the

counter-claim. The defensive matter in the answer, if a defense at all, must be held so upon the ground that the facts alleged show a settlement between the plaintiff, as administratrix, as to the money in the defendant's hands belonging to the estate, and the appropriation of such money in his hands to the payment and satisfaction of his claim against the estate of the intestate.

The allegations in the defensive part of the answer require a most liberal construction in order to make out such a defense ; but admitting, for the purposes of this decision, that such defense is set up in the answer, does it state a legal defense to the plaintiff's cause of action? We think the question must be answered in the negative. In the first place, the rule seems to be well established that in an action brought by an executor or administrator upon a contract made by such executor or administrator himself, after the death of the testator or intestate, or to recover assets belonging to the estate in the hands of a third person, a claim due from the deceased to the defendant cannot be set-off or counterclaimed. The reason of the rule is that, in all such cases the allowance of such set-off or counter-claim would necessarily destroy the equal and just distribution of the assets belonging to the estate among the creditors in every case where the assets were insufficient to pay all the debts of the deceased. *Aldrich v. Campbell*, 4 Gray, 284; *Smith v. Boyer*, 2 Watts, 173; *Aiken v. Bridgman*, 37 Vt. 249; *Woodward v. McGaugh*, 8 Mo. 161; *Newhall v. Turney*, 14 Ill. 338; *Patterson v. Patterson*, 59 N. Y. 574; s. c., 17 Am. Rep. 384; *Lawrence v. Vilas*, 20 Wis. 381, 389-391; 3 Williams Ex'rs (7th Am. ed.), 1876, bottom paging, note *p*; *Lambarde v. Older*, 17 Beav. 542; *Wrouth v. Dawes*, 25 Beav. 369; *Root v. Taylor*, 20 Johns. 137; *Steel v. Steel*, 12 Penn. St. 64; *Shipman v. Thompson*, Willes, 103. Again, to allow the administrator to bind the estate by the appropriation of the debts due to the estate, not due from the defendant to the intestate in his life-time, to be applied to the satisfaction of a debt due the defendant upon a contract made with the intestate, would open the door for avoiding the statute, which requires that all such claims against the estate must be presented to and allowed by commissioners appointed by the County Court, or by the judge of the court, as provided by chapter 165, R. S. 1878; and for the allowance of claims against the estate which had been barred by the provisions of section 3844 of said chapter, because not presented and allowed as required by law.

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If any assets of the intestate in the hands of the administrator, other than a debt due to the estate from the defendant upon a contract made with the intestate in his life-time, can be appropriated to the satisfaction of a debt due from the intestate to such a defendant, it can only be done in a case where it is made to appear affirmatively that the assets in the hands of the administrators are abundantly sufficient to pay all the expenses of the administration, the expenses of the last sickness of the deceased, and his funeral expenses, and that at the time such appropriation by the administrator was made, the claim of the defendant against the estate had not been barred, because not presented for allowance within the time prescribed by law. In a case of that kind there would be very cogent reasons for holding, that in an action by the administrator to recover such assets of the estate in the hands of a defendant, such an appropriation of them by the administrator, when clearly established, might be upheld as a defense to the action. See *Adams v. Butts*, 16 Pick. 343; *Patterson v. Patterson*, 59 N. Y. 574; s. c., 17 Am. Rep. 384. But that is not this case, and it is not necessary therefore to pass upon the rights of a defendant under such circumstances.

[Statutory consideration omitted.]

We think the Circuit judge was right in holding that the defensive matter stated in the complaint did not constitute a defense to the action, and evidence tending to prove it was properly rejected.

We are also of the opinion that the matters set up by way of counter-claim are not pleadable as a counter-claim to the plaintiff's action, and state no cause of action against the plaintiff as administratrix.

We agree with the learned counsel that the claim set up in the counter-claim is one which commissioners appointed to settle claims against the intestate have no jurisdiction to settle or adjust. Section 3838, R. S., provides that upon granting letters of administration, "it shall be the duty of the County Court to receive, examine, and adjust the claims and demands of all persons against the deceased, and such court may, in its discretion, upon the application of the executor or administrator, or of any party in interest, appoint not exceeding three suitable persons to be commissioners, to receive, examine, and adjust such claims and demands when," etc.

It will be seen that the demands and claims spoken of in this section are only such as existed at the time of the death of decedent,

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or such as result from contracts entered into by the decedent in his life-time, and not claims or liabilities incurred by the executor or administrator in executing his trust, and arising after the death of the decedent. 8 Williams Ex'rs (7th ed.), 1876, bottom paging, and note o; *Mathewson v. Strafford Bank*, 45 N. H. 104, 109. As to this matter set up as a counter-claim, there is no objection to it on the ground that it was not presented either to the County judge or the commission for allowance. We think it is not pleadable as a counter-claim to the action by the administratrix, because the administratrix, if liable to pay for the services performed by the defendant at her request in the settlement of the business of the estate, is personally liable therefor, and not in her character as administratrix. It is a general rule that upon all contracts made by an executor or administrator, in the discharge of his duties as such, he is liable personally, and his liability does not depend upon the fact that he has assets in his hands sufficient to discharge the debts so incurred; and the judgment, if any be recovered, is to be satisfied out of his estate, and not out of the estate of the deceased. There are undoubtedly exceptions to the general rule, but they depend upon equitable considerations, which clearly show that the estate in the hands of the executor or administrator ought to be charged with the payment of the claim, rather than the property of the executor or administrator. *Patterson v. Patterson*, 59 N. Y. 574, 586; s. c., 17 Am. Rep. 384; *Hapgood v. Houghton*, 10 Pick. 154; *Adams v. Butts*, 16 id. 344, 346; *Fitzhugh's Ex'r v. Fitzhugh*, 11 Gratt. 300; s. c., 62 Am. Dec. 653; *Minor v. Minor's Adm'r*, 8 Gratt. 1; *Jennison v. Hapgood*, 10 Pick. 77; s. c., 19 Am. Dec. 258; *Ferrin v. Myrick*, 41 N. Y. 315; *Seip v. Drach*, 14 Penn. St. 352; *Demott v. Field*, 7 Cow. 58; *Myer v. Cole*, 12 Johns. 349; *Gillet v. Hutchinson's Adm'rs*, 24 Wend. 184; *Reynolds v. Reynolds*, 3 Wend. 244; *Mathewson v. Strafford Bank*, 45 N. H. 104, 109; *Geyer v. Smith*, 1 Dall. 347; *Fritz v. Thomas*, 1 Whart. 71; *Grier v. Huston*, 8 Serg. & R. 403; s. c., 11 Am. Dec. 627; *Masterson v. Masterson*, 5 Rawle, 139; *Powell v. Graham*, 7 Taunt. 585; *Rose v. Fowler*, 1 H. Bl. 108, 109; *Ashby v. Ashby*, 7 Barn. & C. 444; *Atchison v. Smith*, 25 Tex. 228.

The cases of *Patterson v. Patterson* and *Adams v. Butts*, *supra*, and *Brown v. Evans*, 15 Kans. 88, and *Dunne v. Deery*, 40 Iowa, 251, are exceptions to the general rule, and all depend upon the peculiar nature of the claim against the estate. They were claims,

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either for funeral expenses or tombstones, which were considered funeral expenses. In the first case, a set-off was allowed in an action brought by an administrator upon a claim arising upon a contract made by the decedent, but upon which no liability accrued until after the death, and the second was a direct action against the representative of the deceased. The set-off was allowed in the New York case, on the ground that funeral expenses in that State, as in this, have preference over all other claims against the estate, except expenses of administration ; and although very little is said on the subject in the case in Pickering, it is quite apparent that the fact that the claim had the preference over all others was the principal ground for sustaining the action. The case in Kansas arose upon a covenant made by the administrator upon a sale of real estate of the intestate, and the set-off was allowed in an action to recover the purchase-money. The case in Iowa was mostly for money lent to the administrator to pay the probate expenses.

Perhaps the claims which the defendant sets up as a counter-claim in the case at bar may be denominated as expenses incurred by the administratrix in settling the estate, and be within the reasoning of the courts in the cases above mentioned ; but we are inclined to think the better rule is to hold that all claims of that kind come within the general rule, and that as between the claimant and representative of the estate, the claim should be held to be a personal one to be paid by the administrator, and brought into his general account for allowance by the county court, upon his final settlement in that court ; otherwise the estate might suffer great detriment in the way of costs of litigation in settling the claims for such expenses. It has been and is the clear policy of the law of this State to confine, as far as it can be reasonably done, the settlement of all claims against the estates of deceased persons to the County Courts, acting as Courts of Probate ; and the jurisdiction of all other courts to entertain actions accruing in the life-time of the decedent, or arising out of contracts made by him, is taken away, except in a few specified cases, whenever the proper County Court assumes jurisdiction by taking the proper steps to do so ; and in the absence of any proof on the subject we must presume that such steps had been taken by the County Court in the case at bar. See *Lannon v. Hackett*, 49 Wis. 261; *Carpenter v. Murphey*, 57 Wis. 541.

The policy which confines the jurisdiction of such cases to the County Courts is clearly supplemented by holding with the gen-

eral current of authority that no action can be maintained against the estate for a debt accruing upon a contract made with the administrator in person, when the consideration for such contract is not based upon a liability of the decedent to the party to whom the provision is made. If it be urged, as it sometimes has been, that such a rule would work a hardship in a case where the administrator has incurred a liability for services which have been performed for the benefit of the estate of the intestate, and the administrator is insolvent and unable to pay, such a state of affairs has been held by some of the courts to form an exception to the general rule. But in this State, where the County Court has ample and almost exclusive jurisdiction over all matters affecting the estates of deceased persons, the proper remedy for the party performing such services for the benefit of the estate, when the administrator is unable to pay, would be to present his case by petition to the County Court having jurisdiction of the matter, praying that his claim be allowed as a part of the expenses of the settlement of the estate, and procure an order from that court for the payment of what was justly due out of the estate before the distribution thereof. We see no reason why the County Court would not have jurisdiction to act upon such petition and order the payment of such claim, if just, out of the assets of the estate.

The offer of the defendant on the trial to show that the money in his hands belonging to the estate had been in effect paid to him in satisfaction for his services performed for the benefit of the estate was a defense, if a defense at all, not set up in his answer, and was properly excluded for that reason.

By the COURT. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

Heth v. City of Fond du Lac.

HETH V. CITY OF FOND DU LAC.

(68 Wis. 233.)

Municipal corporation — drains and culverts — surface-water — injunction.

A city may not be enjoined from constructing drains and culverts in streets, merely because they will increase the flow of surface-water upon the land of a complainant lot owner.

ACTION for injunction. The opinion states the case. The plaintiff had judgment below.

P. H. Martin, city attorney, for appellant.

Edward S. Bragg, for respondents.

CASSODAY, J. Everett street runs north and south. The first street west of it and parallel with it, is Harney street. Crossing these streets at right angles, or nearly so, are First, Second, Third and Fourth streets, numbered consecutively from the north toward the south. The plaintiffs, respectively, own lots and reside upon the south side of Second street and between Everett and Harney, McDonald's lot being the corner lot next to Harney. It appears from the evidence that from points at a considerable distance south and southeast of the premises in question, the surface of the ground very gradually descends toward the premises of the plaintiffs, and thence northerly to the lake. From a point on the north side of Second street about two hundred feet east of Everett street, there is a ravine or depression in the surface of the ground, leading northward to the lake, where most of the surface water east of Everett street was accustomed to flow. From a point in Fourth street, about two hundred feet east of Harney, there was a ravine or depression in the surface of the ground leading northward over the north-east corner of McDonald's lot, across Second street, through a culvert and thence to the lake. Along this depression most of the surface water from the west and south-west of Everett street was accustomed to flow. That depression was nearly two feet deeper or lower than the one east of Everett street. The west side of Everett street was about one foot higher than the east side. The result was that the grading of Everett street, the opening of a

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culvert across it at the point designated, and the construction of a ditch or drain from Everett along the south side of Second street to McDonald's lot would increase the flow of surface water in that direction and upon the lands of the plaintiffs. The threatening of these things and the alleged insufficiency of the culvert in front of McDonald's, and the alleged consequences which would follow, constitute the substance of the complaint in this action.

The law as to surface water is too well settled in this State to admit of further juridical discussion. The resident owner of a lot fronting upon a public street in a city cannot be permitted to restrain such municipality from constructing drains along the side or culverts across such street, or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts when completed would greatly increase the flow of surface water upon his land. *Waters v. Bay View*, 61 Wis. 642; *Allen v. Chippewa Falls*, 52 Wis. 430; s. c., 38 Am. Rep. 748; *Hoyt v. Hudson*, 27 Wis. 656; *Turner v. Dartmouth*, 13 Allen, 291; *Barry v. Lowell*, 8 Allen, 127; *Dickinson v. Worcester*, 7 Allen, 19; *Flagg v. Worcester*, 13 Gray, 601; *Parks v. Newburyport*, 10 Gray, 28. The same is true with respect to an adjoining land-owner changing the surface of his land or placing obstructions or embankments thereon to change the course of surface water thereon. *Lessard v. Strain*, 62 Wis. 112; s. c., 51 Am. Rep. 715; *Hanlin v. C. & N. W. R. Co.*, 61 Wis. 515; *O'Connor v. F. du L. & P. R. Co.*, 52 Wis. 526; s. c., 38 Am. Rep. 753; *Eulrich v. Ritcher*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Gannon v. Hargadon*, 10 Allen, 106. This is plainly the rule of the common law, as distinguished from the civil law. *Ramsdale v. Foote*, 55 Wis. 560. It makes no difference in the application of this rule that land is naturally wet and swampy. 7 Allen, 22. In *Waters v. Bay View*, *supra*, one of the principal grounds of the complaint was that the village had "permitted a culvert to become filled up, causing water to dam up and flow back upon" the plaintiff's lands, but it was held that there was no liability. See also *Barry v. Lowell*, *supra*.

The only case in this court which tends in the least to support the contention of the plaintiffs is *Pettigrew v. Evansville*, 25 Wis. 223; s. c., 3 Am. Rep. 50; and that case under the findings of the trial court is certainly exceptional. In that case the trial judge found that all the material allegations of the complaint were true, and the complaint alleged that there was a large pond or body of

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standing water in the village; that the defendant had commenced the excavation of a large ditch from such waters toward the plaintiff's premises and near thereto, "for the purpose of draining said standing water in and upon said premises; that it was not necessary to so drain said water, either to improve the streets of the village, or for any other purpose connected with the duties of said corporation." Viewed in the light of such findings, the case cannot be regarded as an authority in support of this judgment. Here there was no pond of water nor any thing to indicate that there was no necessity for doing what the defendant threatened to do. The only complaint is against the diversion of surface water, and the consequences thereof. It is surface water, which it is found, would, "whenever a flood or heavy rain occurred," stand upon door-yards, fill cellars, injure flowers, trees and shrubbery, and fill and flow upon streets. True, it is found that such things would tend to create malaria and injure the public health, and would constitute and create, at every freshet, a public nuisance, from which special damage would inure to the plaintiffs. But the evidence does not warrant such findings. Besides, the action is not brought on the theory of the abatement of a nuisance, and the complaint does not contain sufficient allegations to warrant equitable interference. Section 3180, R. S., as amended by chap. 190, Laws 1882; *Denner v. C., M. & St. P. R. Co.*, 57 Wis. 221; *Stadler v. Grieben*, 61 Wis. 505. In no event was the city obliged to provide against extraordinary rains and floods. *Allen v. Chippewa Falls*, 52 Wis. 430; s. c., 38 Am. Rep. 748. Besides there is no allegation nor proof of any negligence or unskillfulness in doing the work; as in *Spelman v. Portage*, 41 Wis. 144; *Smith v. Alexandria*, 33 Gratt. 208; s. c., 36 Am. Rep. 788. Nor is there any allegation or proof of any defective plan, or want of skill in the planning of the proposed improvement, as in *City of Evansville v. Decker*, 84 Ind. 325; s. c., 43 Am. Rep. 86; *Gould v. Topeka*, 32 Kans. 485; s. c., 49 Am. Rep. 496; *German Theological School v. Dubuque*, 17 N. W. Rep. 153; *Prideaux v. Mineral Point*, 43 Wis. 513; s. c., 28 Am. Rep. 558. Some courts have held that a defective plan is not a ground of action. *Urquhart v. Ogdensburg*, 91 N. Y. 67; s. c., 43 Am. Rep. 655, and cases there cited; and cases cited in 32 Kans. 485.

There is no complaint of any malicious act on the part of any of the officers of the city, by which the plaintiffs were injured. The

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officers of a municipality improving its streets, solely for the public benefit, in an honest, skillful and careful manner, may, at least to a certain extent, exercise their own judgment and discretion as to the location and construction of drains and culverts, the grading and improving of streets, and the direction in which surface water shall be compelled to flow. This is certainly sufficient to dispose of this case, and is within all the authorities cited, and to these others may be added. *Smith v. Gould*, 61 Wis. 31; *Harrison v. Milwaukee Co.*, 51 Wis. 662-664; *Alexander v. Milwaukee*, 16 Wis. 248; *Methodist P. Church v. Mayor*, 6 Gill, 391; s. c., 48 Am. Dec. 540.

By the COURT — The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to dismiss the complaint.

Reversed and remanded.

 STATE V. BOARD OF EDUCATION.

(68 Wis. 294.)

Statute — schools — regulation that scholars shall carry wood.

A rule of a public school, that every scholar on returning from recess shall bring in a stick of wood for the fire, is not “needful for the government” of the school.

MANDAMUS for reinstating a suspended pupil of a public school. The opinion states the point. The defendant had judgment on demurrer below.

George E. Sutherland, for appellant.

P. H. Martin, for respondent.

COLE, C. J. One can but express surprise that any intelligent teacher or intelligent board of education should suffer such a case as this to reach the courts. The fact that it is here can only be accounted for on the ground that either the teacher or the board of education, perhaps both, have sadly misconceived their powers and duties, or have been actuated by some improper motive in excluding the relator's son from the public school. The reasons for excluding him, as stated in the return, are, in substance, that

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the board of education — which is clothed with power to make rules and regulations for the government and organization of schools, for the reception and instruction of pupils, and for the preservation of good order and discipline in schools — did, long prior to the supposed grievance of the relator, enact certain rules, among which were these: “Rule 27. Any pupil guilty of disobedience to a teacher, or of gross misconduct, may be suspended by the principal.” “Rule 29. Any pupil suspended from school by virtue of any one of the foregoing rules can be readmitted only by bringing a written permit from the superintendent.”

It is then stated that for many years there had existed in all the schools of the city of Fond du Lac, except the high school, a regulation known and approved by the board, whereby the teachers of the several schools have been authorized to and have required each pupil of sufficient age and bodily strength, upon returning from the play-ground at recess, to bring with him a stick of wood fitted for stove use, to supply the stoves with fuel in the rooms occupied by such pupils, and to keep the rooms warm and comfortable. It is for a refusal of the relator's son to conform to this regulation that he was suspended.

It is further stated that the refusal of the boy was in presence of the scholars of the school, and was without cause other than to cause a breach of the order and direction of the teacher and principal, and in defiance of their authority, and was calculated to bring such authority into contempt, etc. On account of the disobedience of the pupil to conform to this regulation, to sustain his authority over and discipline in the school, the principal and teacher caused the pupil to be suspended, and notice thereof in writing to be given to the relator and superintendent.

In contesting the sufficiency of this return, the learned counsel for the relator insists that the rule or regulation requiring pupils to bring up wood for use in the school-room is unreasonable, and not binding upon any pupil who does not wish to comply with it; that it does not relate to a subject which concerns the education of pupils or discipline in the schools; therefore that the board had no right to adopt and enforce it to the extent of excluding a pupil who did not conform to it. He says our public schools are organized and maintained for the education and improvement of children in learning; that no rule is proper which does not conduce to these ends — that does not in some way promote the good order or govern-

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ment of the schools; secure the decorum and quiet in the school-room which are essential for advantageous instruction and discipline. Consequently any rule or regulation which has for its object any thing outside of the instruction of the pupil—the order requisite for instruction—is beyond the province of the board of education to adopt. The requirement that school children should bring up wood, when not by way of punishment or discipline for misconduct, has nothing to do with the education of the child. It is nothing but manual labor, pure and simple, and has no relation to mental development. If a child can be compelled to bring up wood, he can be made to saw and split it before it is brought up; he can be compelled so bring it to the school-yard and throw it in the basement; can be made to clear the sidewalk of snow, wash the windows, or do any other menial work about the school-house and ground.

It seems to us difficult to escape the force of this argument. School boards and boards of education have important duties to discharge, and we have no disposition, as our decisions show (*Morrow v. Wood*, 35 Wis. 59; s. c., 17 Am. Rep. 471; *State, ex rel. Burpes, v. Burton*, 45 Wis. 150), to circumscribe their powers in too narrow a compass. The statute clothes them with power to make all needful rules for the government of the schools established within their respective jurisdiction, and to suspend any pupil from the privileges or the school for non-compliance with the rules established by them, or by the teacher with their consent. Section 439, R. S.; Laws of 1883, p. 426, ch. 152, subch. 15, section 10. While from the necessity of the case much discretion must be left to these boards as to the nature of the rules which are prescribed, yet it cannot fairly be claimed that the boards are uncontrolled in the exercise of their discretion and judgment upon the subject. The rules and regulations made must be reasonable and proper, or in the language of the statute, “needful,” for the government, good order, and efficiency of the schools,—such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. But the rules and regulations must relate to these objects. The boards are not at liberty to adopt rules relating to other subjects according to their humor or fancy, and make a disobedience of such a rule by a pupil cause for his suspension or expulsion. We therefore think the rule or regulation requiring the pupil to bring up wood for use in the

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school-room was one which the board had no right to make and enforce.

[Minor matters omitted.]

The return is defective in law for the reasons given, and the demurrer to it should have been sustained.

By the COURT — The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

Reversed and remanded.

IN RE STAFF.

(63 Wis. 285.)

Constitutional law — statute permitting prisoner to waive jury.

A statute enabling a prisoner accused of felony to waive a jury trial is constitutional.

HABEAS CORPUS. The opinion states the case.

C. M. Scanlon, for petitioner.

Attorney-General and *H. W. Chynoweth*, assistant attorney-general, for respondent.

LYON, J. A writ of *habeas corpus* having been duly issued out of this court, directed to the warden of the State prison, commanding him to produce before this court James Staff, then in his custody, to the end that the legality of his imprisonment might be inquired into, such warden, in obedience to the mandate of the writ, has brought the said Staff before the court and made return to the writ.

The cause for the imprisonment of Staff is undisputed. It appears, both by the petition upon which the writ was allowed and issued and by the return of the warden to the writ, that the prisoner was convicted in the municipal court of Rock county, on an information charging him with the crime of larceny from the person of one Chubbuck of a pocket-book and money therein, of the value of \$84.75, and was thereupon sentenced to imprisonment for two years in the State prison. The information and the form of

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the judgment and commitment are regular, and no question is raised upon either.

The only alleged defect in the proceedings is that when the prisoner was brought up for trial on his plea of not guilty, he expressly waived a jury trial, and such waiver was duly entered in the minutes of the court. Thereupon he was tried by the court, found guilty and sentenced. It is now claimed in his behalf that it was not competent for him to waive a jury trial, and hence that his conviction was illegal and void and the court had no jurisdiction to proceed thereon to judgment and sentence. If the prisoner could not effectually waive a trial by jury, the court had no jurisdiction to try him, and the conclusion seems undeniable that the judgment would in that event be entirely void. Hence, upon the petitioner's theory of the case, *habeas corpus* is the proper remedy, notwithstanding it is well settled that mere irregularity in proceedings resulting in the imprisonment, however flagrant, is not sufficient ground to discharge on *habeas corpus*. That may lawfully be done only where the proceedings are void for illegality. *In re Crandall*, 34 Wis. 177; *In re Pierce*, 44 Wis. 411; Hurd. Hab. Corp. 327. Failing the jurisdiction of the court to try and convict the accused without a jury, the court exceeded its jurisdiction as to subject-matter and person, and its judgment and process of commitment, although in proper form, were issued in a case not allowed by law. Such alleged excess, or want of jurisdiction, may be inquired into on *habeas corpus*, and if found to exist is ground for a discharge of the accused. R. S., § 3428, subd. 1, 4.

Was it competent for the prisoner to waive his right to be tried by a jury? His counsel maintains that the judgment of this court in *State v. Lockwood*, 43 Wis. 403, answers this question in the negative. The assistant attorney-general refers us to the statute creating the municipal court for Rock county (chapter 197, Laws of 1881), and to the following clause in section 8 thereof, to-wit: "A jury trial in said court in criminal cases begun by information, or not originally begun in said court, may be waived by the accused in writing, or by consent in open court, entered on the minutes," and maintains that under this statute, the above question must be answered in the affirmative. If the statute be sustained, the trial of the prisoner was regular, and the conviction cannot be questioned. The precise question to be determined therefore is this: Is the provision of the statute above quoted a valid law? It cer-

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tainly is a valid law unless it contravenes section 7, article I of our Constitution, which ordains, that "in all criminal prosecutions, the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf, and in prosecutions by indictment or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law."

The cases which hold that in a criminal prosecution the accused cannot effectually waive a jury trial are quite numerous, and as was said by the late chief justice in *State v. Lockwood*, such is undoubtedly the current of authority. None of those cases however involve the consideration of statutes like that under consideration. They were determined upon general principles without regard to statutes, and they disclose a radical difference of opinion by different courts as to the grounds upon which the rule is based.

The constitutional provision above quoted is found in nearly or quite all of the State Constitutions as well as in the amendments to the Constitution of the United States. Article VI, amendment of 1791. Some courts have held that it prescribes the tribunal in which and before which criminal prosecutions must be tried, and that a jury is an essential part of such tribunal, and cannot therefore be dispensed with by consent of the accused, or otherwise. A leading case which sustains this view of the provision is that of *Cancemi v. People*, 18 N. Y. 128. In that case the prisoner was, with his consent, tried by eleven jurors and convicted. The judgment was reversed for that reason. Manifestly the same principle is involved where the whole jury is waived, for eleven jurors are not a good common-law jury. In the opinion of the court, written by Judge STRONG, it is said: "But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the Constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant." This opinion is fortified (or attempted to be) by reference to the cases of *Lord Dacres* and *Lord Audley*, in England. Lord Dacres was indicted for treason in 1535, and was tried by his peers, the duke of Norfolk being high steward. All of the judges assembled on the day

before the trial to resolve certain questions which might arise upon the trial. One of these questions was whether the prisoner might waive his trial by his peers and be tried by the country, and they all agreed he could not, resting their decision upon the following clause of *Magna Charta*: "No free person shall be taken or imprisoned, or shall be dispossessed of any free tenement of his, or his liberties or free customs, nor shall he be outlawed or be punished in any other way; nor will we come upon him, nor send him to prison, unless by legal decision of his equals, or by the law of the land." *Magna Charta*, by Wells, 65, § 29. When arraigned and asked how he would be tried, the report says the prisoner "took long time to consider, and would not have put himself upon his Peers; but at last the high steward told him that he must give judgment against him as a traitor unless he put himself upon his Peers, as against one who refused the Tryal of Law; and thereupon he put himself for his Tryal upon his Peers." *Case of Lord Dacres*, J. Kelyng's Crown Cas. 89. It may be a relief to know that Lord Dacres was acquitted, and an acquittal in prosecutions for treason was so rare in those days that this fact is mentioned, in an extract from Hargrave, found in 1 How. St. Tr. 407, as an apology or inducement for mentioning the case.

Lord Audley was tried in 1631 on an indictment for felony. As in the case of *Lord Dacres*, the judges were summoned before the trial and the question, among others, was submitted to them whether a peer of the realm might waive his trial by his peers and plead he will be tried by God and the country. The judges answered: "He might not: for his trial by peers was no privilege, but the law declared by *Magna Charta*; which if he would not plead to by a trial of his peers was standing mute." *Case of Lord Audley*, 3 How. St. Tr. 401.

The language of *Magna Charta* is that no free person shall be imprisoned, "unless by legal decision of his equals." This is not the conferring of a privilege upon the accused, but prescribes the tribunal by which he shall be tried; hence the judges said that it was no privilege, but the law. See also 2 Wooddeson's Lectures, 581 (2d ed. 346). So also the Constitution of the United States as originally adopted provided that "the trial of all crimes, except in cases of impeachment shall be by jury." Art. III, § 2. Under such a provision it would most undoubtedly be held that in the trial of criminal causes other than impeachments a jury could

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not be dispensed with by consent of the accused, or otherwise. But the provision of our Constitution above quoted, as well as that of New York, is entirely different. In terms it grants privileges. Its language is: "The accused shall enjoy the right, * * * in prosecutions by indictment or information, to a speedy public trial by an impartial jury," etc. It seems to us that the courts of New York, and other courts which have adopted the same reasoning, have overlooked this distinction.

It is obvious that if the constitutional provision under consideration was correctly interpreted by the New York court,—that is to say, if the Constitution prescribes the tribunal for the trial of criminal prosecutions, and makes a jury an essential part of it,—it is beyond the power of the legislature to change the tribunal by eliminating the jury therefrom, or by allowing the accused to do so.

It may here be observed that *Cancem v. People* was a capital case, the indictment and conviction having been for murder, which was and is punishable by death in that State. Many of the cases which hold that the prisoner cannot effectually waive a jury are of the same class. The judgments in those cases may well be sustained on the principle or rule which has sometimes been asserted that in capital cases, in *favorem vitæ*, the prisoner can waive nothing. It may also be remarked that some of the cases seem to make a distinction between felonies and misdemeanors, holding that in a prosecution for a misdemeanor a jury may be dispensed with by consent of the accused. This distinction was ignored in *State v. Lockwood*, 43 Wis. 403; and in respect to misdemeanors, the punishment for which is or may be imprisonment, there seems to be no substantial ground upon which to rest the distinction. If the line can be drawn between different grades of crime, perhaps a plausible reason might be given for holding that misdemeanors punishable by fine only are distinguishable from other crimes. It might be said that a criminal prosecution for such a misdemeanor is in its results essentially like a civil action sounding in tort. In either case judgment against the defendant is for dollars and cents only, and imprisonment may follow non-payment thereof.

Some courts, notably the Supreme Court of Iowa, in view of the peculiar terms of the constitutional provision under consideration, have held that the rights guaranteed therein are merely privileges granted the accused, which he may waive without the aid of any

statute. It was so held in *State v. Kaufman*, 51 Iowa, 578; s. c., 33 Am. Rep. 148. The opinion is by Judge SEEVERS, and it would be hard to refute the vigorous logic with which he sustains the conclusion and judgment of the court. It is not necessary however for us to go to that extent in this case, and indeed we cannot do so without overruling the case of *State v. Lockwood*, *supra*. That judgment went upon the ground that the right of trial by jury secured by the Constitution rested upon public policy, and could not therefore be waived by the defendant.

It has already been observed that in *State v. Lockwood*, and in numerous other cases elsewhere which hold the same doctrine, no question of the power of the legislature to provide for the waiver of a jury was involved or considered. The question is now raised for the first time in this court. We find no provision in the Constitution which denies to the legislature the power to permit a person charged with crime to waive a jury and be tried by the court. There may be circumstances which would lead the accused to desire such a trial, and it might be greatly to his benefit. Why should he be denied the privilege? In the absence of a statute conferring it, there may be some good reason resting in considerations of public policy (although perhaps not very apparent) why he should not have such privilege. But when the legislature says that he may have it, and thus establishes a different public policy, what constitutional rule is violated? Public policy is to some extent a creation of the legislature. The statutes embody much of the public policy of the State, and that policy may be one thing to-day and the opposite to-morrow, as the legislature in its wisdom may enact. It was the public policy of the State to deny to persons about to be tried for crime the power effectually to waive a jury. It is now its policy to permit such waiver in the municipal court for Rock county, and in some other courts, and perhaps hereafter the same policy may be extended to all trial courts in the State. We cannot perceive wherein such legislation infringes the Constitution. We have more difficulty in finding a satisfactory reason for holding that any legislation is required to confer the right to waive a jury. Section 7 of article I confers many rights upon a person accused of crime, every one of which he may waive without authority of statute, as has often been judicially determined, except the right to be tried by a jury. Such waiver may be express, or it may be by failure to make due objection and exception. The

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accused shall enjoy the right to be heard by himself and counsel; yet he need not have counsel unless he chooses, and need not say a word in his own defense; he may plead guilty, and thus waive every right conferred in the section. He may demand the nature and cause of the accusation against him; yet when arraigned he may waive the reading of the indictment or information. He has the right to meet the witnesses face to face, yet he may lawfully consent to the reading of depositions of absent witnesses in evidence. He is entitled to compulsory process to compel the attendance of his witnesses, yet he may not avail himself of such process. He is entitled to a speedy public trial, yet with his consent trial may be delayed for years, and no doubt the public at large may properly be excluded from the trial at his request. He is entitled to a trial in the county or district previously ascertained by law wherein the offense was committed, yet he may have a change of venue, and with his consent the cause may be sent to some county or district and tried therein, hundreds of miles distant from that in which the crime was committed. He is entitled to be tried by a jury, that is, a common-law jury, which must consist of twelve qualified jurors; yet if one of the jurors is disqualified for alienage or other cause, in this State the objection is waived by the failure of the accused to challenge such juror. *State v. Vogel*, 22 Wis. 471.

It is not strange that the Supreme Court of Iowa, untrammelled by previous adverse decisions in that State, added to the list the only remaining right given the accused by section 7, and held that without any statute authorizing it, the accused may also waive the right to be tried by a jury. The reason why we cannot go to the same extent has been already suggested. But we have no difficulty whatever in holding that the public policy which stood in the way of an effectual waiver of a jury by the accused in a criminal case is not so inherent in the form and frame-work of our government as to place it beyond the reach of legislative interference, but that it is the subject of legislative control. In this view we are sustained by ample authority in other States where laws have been enacted authorizing the waiver of juries in criminal cases, and by other cases in States where no such laws have been enacted, but which recognize the power of the legislature to do so. *State v. Worden*, 46 Conn. 349; s. c., 33 Am. Rep. 27; *Ward v. People*, 30 Mich. 116; *Dillingham v. State*, 5 Ohio St. 280; *State v. Mansfield*, 41 Mo. 470; *Brown v. State*, 16 Ind. 496. In the opinion by Judge CAR-

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PENTER, in *State v. Worden, supra*, will be found a very able and interesting discussion of the subject.

The cases which illustrate and affirm the foregoing propositions are very numerous. It has been thought necessary to cite but a few of them. Reference to many of these cases will be found in Cooley's Const. Lim. (5th ed.), 391, note 2; in the notes to sec. 113, Proff. Jury Tr.; in an article by Judge ELLIOTT in 6 Crim. Law. Mag. 182, on "Waiver of Constitutional Rights in Criminal Cases," and in the able brief herein of Mr. Chynoweth, the assistant attorney-general.

Our conclusion is that the act of 1881 under consideration is a valid law, and hence that the defendant effectually waived his right to a jury trial, and was properly tried by the court. The judgment and sentence are therefore legal and valid, and the prisoner, James Staff, must be remanded to the custody of the warden of the State prison.

By the COURT. It is so ordered.

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(63 Wis. 307.)

Master and servant — negligence — foreign freight car.

A railway brakeman was killed in trying to couple a freight car from another road, to a caboose, by reason of the difference in height of the couplings, which was apparent. *Held*, that his employer was not liable. (*See note, p. 296.*)

ACTION against Wisconsin Central Railroad Company, and defendant Abbot, as trustee, for negligent killing of plaintiff's intestate. The opinion states the case. The defendant had judgment below on demurrer.

A. A. Kelly and Duffy & McCrory, for appellant.

Edwin H. Abbot, in person, and *Howard Morris*, for respondent.

ORTON J. This is an appeal from the order sustaining a general demurrer to the complaint, on the ground that it does not state a cause of action. The following facts are stated in the complaint:

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The intestate was, and had been for a long time, a brakeman on one of the freight trains of said company, which ran between Fond du Lac and Menasha, and it was his duty to couple freight cars to the caboose. On the day the intestate lost his life, the train was run out on a side track at Fond du Lac for the purpose of coupling a freight car which belonged to the Chicago, Milwaukee & St. Paul Railway Company to the caboose at the rear end of said train. The coupling iron of the freight car was too high and that of the caboose was too low for such coupling, and when the train moved up toward the caboose, the intestate stepped between the freight car and the caboose, and in attempting to do such impossible coupling, the coupling irons passed by each other over and under, and the intestate was caught between the platform of the caboose and the end of the freight car, and crushed and killed. The duty of the company to provide cars of suitable couplings and adapted to each other, and the negligence of the company in not doing so and in allowing such a freight car of another company to be brought upon the track to be so coupled, and the care and prudence of the intestate, were alleged.

The want of adaptation of these two cars to each other (in all respects properly constructed in themselves) was the only defect, and the furnishing of them by the company and requiring them to be so coupled constituted the only negligence of the company complained of. There is no reason stated why the intestate did not or could not have discovered this apparent want of adaptation of the coupling irons of the caboose and car. It was presumably in the day-time, as it is not stated that it was in the night. That the coupling irons were so widely mismatched would seem to have been as observable and readily seen as the entire absence of coupling irons, one or both. It is not to be inferred that this was the only instance when the cars of different roads, brought together to be coupled, were so mismatched. It might rather be inferred that not unfrequently they have coupling irons higher or lower than each other, and that there is no reasonable assurance that they are always adapted to each other in this respect. This would seem to impose the duty upon the brakeman, before going between such cars and the caboose or cars of the road on which he is employed, to couple them together, to observe more closely and to use more caution than if he was attempting to couple the cars of his own road, which are adapted to each other by construction or selection,

in order to ascertain whether their coupling irons would meet or pass each other. There is no allegation that he even looked to see, or that he could not have seen if he had looked, this clearly apparent difference in the elevation of these coupling irons, or that his attention was diverted.

The difference in the elevation of the coupling irons of this foreign car and the caboose or other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangers his own life by not seeing, observing or knowing of such difference in the elevation of the coupling irons. Did not the intestate have the same, if not superior, means of knowing this difference, or as to that of the company? If the negligence of the intestate and that of the company in this respect are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law.

In *Ballou v. C. & N. W. R. Co.*, 54 Wis. 257; s. c., 41 Am. Rep. 311, the company was not held chargeable with knowledge of latent defects in the ladder of a foreign freight car by which the intestate in that case lost his life. Mr. Justice CASSODAY said in the opinion: "Certainly, a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would in many instances operate as a prohibition upon interstate commerce."

In *Smith v. Flint, etc., Ry. Co.*, 46 Mich. 258; s. c., 41 Am. Rep. 161, a brakeman's arm was crushed by his attempting to couple two foreign cars in the night-time, the deadwood of one

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of which had fallen down below that of the other, and they passed by each other. A verdict for the defendant was ordered and the judgment was affirmed. The case is very much in point. See, also, *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. C., R. I. & P. R. Co.*, 50 Iowa, 680; *Hathaway v. M. C. R. Co.*, 51 Mich. 253; s. c., 47 Am. Rep. 569; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212.

The liability of the railway company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees may work, but upon its knowledge, actual or presumed, that such coupling appliances will not properly fit and connect with each other. I have therefore briefly compared the means of knowing this unfitness of the coupling apparatus which the company and the intestate had, in order to see whether the greater negligence should be imputed to the company rather than to the intestate. It does not appear from the complaint that the company had not in their employ at the time suitable persons to make inspection of all such foreign cars and ascertain their fitness to go into its trains, and it is presumed that such persons were so employed, and that other employees of the company caused the foreign car in this case to be upon the side track ready to be coupled to the caboose. If therefore there was any negligence on the part of any one in not ascertaining before-hand that their couplings would not meet, it must have been the negligence of the co-employees and fellow-servants of the intestate, for which the company is not liable.

This case seems to be ruled in principle by the recent case of *Whitwam v. W. & M. R. Co.*, 58 Wis. 408. In that case the draw-bar of the car was too short to be safely coupled to or detached from the engine, and the plaintiff, who was a brakeman, in attempting to detach the car from the engine, was injured. Mr. Justice LYON said in the opinion: "It seems to us that the gravamen of this action was the coupling of the Green Bay car to the engine with the short draw-bar, and this is, really, the only negligence charged in the complaint. It does not appear when, where, or by whom this Green Bay car was attached to such engine, but the attaching of it, as well as the order detaching it therefrom, was manifestly the act of the servants of the defendants, engaged in operating their railroads, and hence of the co-employees of the plaintiff, and there-

fore the defendants are not liable for the injury to the plaintiff resulting therefrom."

The case of *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112, is perhaps more nearly in point both in facts and principle. In that case the complaint was that the coupling bars of a flat car, loaded with iron, of one company, and of a caboose of another company, were of different heights, and the plaintiff, in stooping down between the cars to do the coupling, had his hand crushed between the bars. It is said in the opinion by Mr. Justice SHELDON that it was the plaintiff's own fault "in not ascertaining the condition of the cross-bars before attempting the coupling; and that "from his experience as a switchman in the yard, and the frequent coming in of cars thus constructed from other roads, he had reason to suppose that the car in question was liable to have a draw-bar in the situation it was here, and it was his plain duty to examine and ascertain, as he safely might have done, what was the condition of the car in this respect before venturing upon the coupling."

It seems to us plain enough that if there was any fault or negligence anywhere in this case, it was that of the intestate or his fellow-servants and co-employees, and the defendants are not liable. It is very sad and pitiful that so many deaths and severe personal injuries result from coupling cars; but this part of the employment of a brakeman is extremely dangerous and hazardous, and especially when it becomes necessary to couple cars coming from different roads with dissimilar coupling appliances; and the care necessary to be used increases in proportion to such danger, and the law exacts its exercise, or it will refuse redress.

The demurrer was properly sustained.

By the COURT — The order of the Circuit Court sustaining the demurrer to the complaint is affirmed, and the cause remanded for further proceedings according to law.

Cause remanded.

NOTE BY THE REPORTER.—See, to the same effect, *Tierney v. Minneapolis, etc., R. Co.*, ante; *Mackin v. Boston & Albany R. Co.*, 135 Mass. 201; s. c., 46 Am. Rep. 456; *Foley v. Chic., etc., R. Co.*, 48 Mich. 628; s. c., 46 Am. Rep. 481.

In *Gottlieb v. N. Y. C. R. Co.*, 100 N. Y. 462, the contrary was held. The court said:

"In this case the evidence tended strongly to show that the bumper on each of the two cars which the plaintiff was attempting to couple was made of a strip of wood only three inches thick nailed on to the car, thus leaving, when

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the cars came together, a space of only six inches, wholly insufficient for the protection of the brakeman.

“The defendant was under obligation to its employees to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars and machinery for the discharge of their duties, and upon the assumption that the defendant was responsible for the condition of these cars as if they were owned by it, there can be but little doubt that the evidence was ample to show that it had failed in its duty to the plaintiff. The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different gauge. But these two cars did not belong to the defendant. They belonged to other companies and came to it loaded, and it was drawing them over its road to their destination. They were in good repair and the defects were in their original construction, they being just as they were originally made. The defendant claims that it was bound to receive and transport these cars over its road, and was under no responsibility for any defects in their structure, and that the plaintiff upon entering into its employment assumed all risks from such defects.

“It is not necessary in this case to lay down with precision the rule which governs the responsibility of railroad companies as to the cars of other companies which it is engaged in transporting over its road. In *Baldwin v. Railroad Co.*, 50 Iowa, 680, it was held that it does not constitute negligence for a railroad company in the ordinary course of business to receive and transport the cars of other roads in general use which may not be constructed with the most approved appliances; and that the transportation or use of such cars by the company is one of the risks which an employee assumes in undertaking the employment. In *Ballou v. Railroad Co.*, 54 Wis. 257; s. c., 41 Am. Rep. 81, it was held that one railroad company receiving a loaded car from another and running it upon his own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. The judge writing the opinion said: ‘In such case it would seem, upon principle, that the company receiving a loaded car from another company is entitled to the benefit of the presumption that such a car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and that it was reasonably fit for the use to which it was devoted when so received.’ In *O’Neil v. Railroad Co.*, 9 Fed. Rep. 847, it was held that the defendant was bound that no car, whether its own or a foreign car, should be otherwise than reasonably and adequately safe for its employees to handle and to manage in the ordinary conduct of its business; that when a railroad company hauls over its road cars not belonging to it, if an accident occurs from their being not reasonably safe or adequate under any circumstances, for the business for which they are employed, and the accident occurs without the negligence of the employee, the company must respond thereto; and that the question in such a case is, was the car reasonably and adequately safe for the employee in handling the same? In *Mackin v. Railroad Co.*, 135 Mass. 201; s. c., 46 Am. Rep. 456, it was held that the defendant was

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bound as a common carrier to receive and draw cars brought to it from other roads, but that its obligation to draw such cars did not extend to such as were unsafe, and that as to cars so received it simply owed to its employees the duty of suitable inspection. In *Jetter v. Railroad Co.*, 2 Abb. Ct. App. Dec. 458, the defective car causing the injury belonged to another company, and the judge writing the opinion said: 'The party assuming to use it was responsible for its fitness to the use to which it was put. If the brakes were defective, the defendants were legally chargeable with any consequences that resulted from such defect while they were using the car for their own purposes,' and that 'railroad companies cannot escape responsibility from any defective carriages by borrowing them from one another.' In *Jones v. Railroad Co.*, 28 Hun, 864 affirmed in this court, 92 N. Y. 628, plaintiff's intestate, a brakeman, was attempting to climb upon a freight car, and one of the iron rungs which was defective broke and he fell to the ground and was killed, and it was held that the defendant was liable although the car belonged to another company. See also *Miller v. N. Y. C. & H. R. R. Co.*, 99 N. Y. 657.

'It will thus be seen that the utterances of judges as to the responsibility of one company for the defective cars of another company drawn over its road are not entirely harmonious, and yet we think all the authorities hold that the company drawing the cars of another company over its road owes, in reference to such cars, some duty to its employees. It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much at least is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects the duty of the company is the same as to all cars drawn over its road. The rule imposing this responsibility is not an onerous or inconvenient or impracticable one. It requires before a train starts and while it is upon its passage the same inspection and care as to all the cars in the train

'The defect here complained of was obvious, easily discoverable by the most ordinary inspection, and it seems that it could have been easily remedied by simply nailing or fastening additional strips of wood to the ends of the cars so as to give the bumpers sufficient width to afford the protection needed and intended.

'These rules of law were not violated by the trial judge in his charge when it is applied to the facts of this case. He charged: 'In considering these questions you can lay out of view the fact that these cars did not belong to the company. I charge you that it was entirely immaterial whether this was a hired or borrowed car, or whether it belonged to the company or not. If the company placed it in operation and placed it before its employees for use, then they were held to liability if it was defective, and if you shall find it to have

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been defective.' And upon the request of the defendant's counsel he refused to charge, 'If the cars between which the plaintiff was injured were those of another company than the defendant, it is not chargeable with negligence if they were improperly constructed or for any construction. The extent of the defendant's duty was to see that they were in good repair while on the road.' While the charge as made may have been erroneous so far as it laid down a general rule, as applied to this case, where the defect complained of was plainly visible and easily discoverable by ordinary inspection without the application of any extraordinary or unusual tests, it was sufficiently accurate."

GILLULY V. CITY OF MADISON.

(63 Wis. 518.)

Municipal corporations — gutters — surface water.

A city, for unskillfully constructing a gutter, or negligently suffering it to be out of repair or obstructed, by reason of which surface-water floods an adjacent lot, is liable to the owner although the lot was below grade.*

ACTION for injury by surface water by raising grade of street and unskillfully constructing a gutter, and negligently suffering it to be obstructed. The opinion shows the facts. The plaintiff had judgment below.

R. M. Bashford, for appellant.

Smith & Rogers, for respondent.

COLE, C. J. The learned counsel for the defendant insists that the court below erred in refusing to give an instruction, asked on the part of the city, to the effect that it was not liable for any error or want of judgment upon which its system of drainage was devised, nor for any defect or want of efficiency in the plan of drainage adopted. The answer to this objection is that the plaintiff does not rest the liability of the city for the damage to his property on any such ground, as we understand the case. He does not claim that the system or plan of drainage adopted by the city was unsuitable or defective, and that he was thereby injured. It may well be the law, as claimed by counsel, that a municipal corporation is not liable for any error or want of judgment upon which its system

* See *Bryant v. City of St. Paul*, ante, 31.

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of drainage of surface water may be devised, nor for any defect in the plan which it adopts. The common council must, from necessity, exercise its judgment and discretion in such matters, and should be at liberty to adopt what seems to be the best plan to accomplish the end, having regard to the means at the disposal of the city for the purpose of sewerage. "When the injury is occasioned by the plan of the improvement, as distinguished from the mode of carrying the plan into execution, there is not ordinarily, if ever, any liability." 2 Dill. Mun. Corp. § 1051. But as we have said, the plaintiff does not rest his right of action on the ground that the plan of drainage adopted by the city was defective and injured his property; hence, though the instruction was correct as an abstract proposition, it was not applicable to the case. Consequently it was not error to refuse it.

The next error assigned is the refusal of the court to give portions of the third and fourth instructions, and the entire sixth instruction. The proposition embraced in these instructions not given, is in substance, that if plaintiff's premises were below the grade of the street, and the injury complained of was in any way occasioned by reason thereof, or if a greater quantity of surface water was thrown upon the premises than they would have received if raised to the proper grade, after the city had established it and constructed its system of drains and sewers, then the city was not liable for such damage, it being the duty of the plaintiff to raise his premises to the proper grade. In support of the correctness of these instructions counsel quotes a portion of the section of Judge Dillon's work which we have above cited from. In that section the learned author has stated what he deems the result of the authorities on the question of municipal liability for injuries caused by surface water, in four general propositions. We have already given his second proposition. It may be well, in order to have the views of this eminent jurist on this question, to quote the rest of the section, which is as follows:

"*Third.* But in the case last supposed there will be a liability, if the direct effect of the work, particularly if it be a sewer or drain, is to collect an increased body of water, and to precipitate it on to the adjoining private property to its injury. But since surface water is a common enemy which the lot-owner may fight by raising his lot to grade, or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power

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to fight surface water in its streets as the adjoining private owner, it is not ordinarily, if ever, liable for simply failing to provide culverts or gutters adequate to keep surface water off from adjoining lots below grade, particularly if the injury is one which would not have occurred had the lots been filled so as to be on a level with the street. The cases are not in harmony on the point last presented, but the above is believed by the author to be the correct doctrine. *Fourth.* There is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts or sewers, or of the negligent failure to keep the same in repair and free from obstruction; and this, whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity."

Now when the facts of this case are considered, one can hardly fail to see that according to this statement of the law the city is liable for the injury complained of; for the gravamen of the complaint is — and there was evidence tending to prove it — the negligent and unskilful construction of the gutter along the plaintiff's premises, especially the failure of the city to keep the same clear from obstructions so that the surface water would have a free passage-way through it. This is apparent from the allegations that the gutter nearest the plaintiff's premises, for a distance of eighty-five feet, was merely a blind ditch, the sides of which are laid up with quarry stone, without plaster or cement to keep the water from percolating through it; that on account of the insufficient size of that portion of the gutter, and the rough and uneven material of which it is made, the short angle it makes where it intersects the north line of University avenue, and that the bed of the gutter is ascending instead of descending, the gutter is incapable of readily receiving and discharging the large quantity of water which is accumulated in time of rains. And it is further alleged that the city, by its careless and negligent management of the gutter, has permitted weeds and other obstructions to grow in and obstruct the passage-way of water since its construction, by reason whereof large quantities of water, during the wet season of 1882, and every preceding year, since the gutter was built, have escaped from this blind ditch into plaintiff's cellar, basement, and garden. This, we think, states an actionable wrong. It is true the evidence shows that the prem-

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ises were below grade. And the real meaning of the instructions refused is, if the premises were below the established grade, and the injury was in, any way occasioned by reason thereof, there could be no recovery, because it was the duty of the plaintiff to raise his lot to the proper grade. This was, in effect, ignoring all negligence on the part of the city in the construction of the gutter, and in failing to keep it free from obstructions.

In this case an increased quantity of surface water, collected from other sources than the adjoining street, was made to flow in the gutter to and around the plaintiff's premises. It seems to us it was the duty of the city to exercise reasonable care in the construction of the gutter in the first instance; also not to suffer it to get out of repair, or fill up with weeds and other matter, so as to cause the water to overflow into the plaintiff's cellar and basement, to his injury, whether the premises were below grade or not. The case is distinguishable from *Allen v. Chippewa Falls*, 52 Wis. 430; s. c., 38 Am. Rep. 748; *Waters v. Bay View*, 61 Wis. 642; and *Heth v. Fond du Lac*, 63 Wis. 228; s. c., 53 Am. Rep. 279, where there was no allegation or proof of any negligence or unskillfulness on the part of the municipality, either in grading its streets, or in constructing gutters thereon for carrying off surface water.

At first glance, the case of *Waters v. Bay View* might seem to affirm the immunity of the defendant city; but there is a very marked distinction between that case and this. There the village, in grading Potter avenue, allowed an old gutter to remain, or constructed a new one under the street to carry off the surface water which sometimes accumulated on the adjoining lands of one Link, and the lands of the plaintiff and others beyond the lands of Link, and which usually passed off through a ravine down to and through this culvert. The culvert became obstructed, and thereby caused the surface water to flow back upon the lands of the plaintiff. The court decided that the village was not bound to make provisions for carrying off the surface water; that it had the same right over its streets as any other owner, and might hinder the flow of surface water upon the street from the lands of other proprietors; and when it made provision by a sewer or drain to carry off the surface water of adjoining lands, it might discontinue or abandon the sewer, if such owners were left in no worse condition than they would have been if such sewer or drain had never been made.

In this case it appears that surface water was drawn from lands

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on the opposite side of the street by means of a culvert, also was collected from other sources than the street,— surface water which otherwise would not have run to the plaintiff's lot,— and was carried along the side of the street in a gutter or blind ditch around on his premises. If there was negligence in the construction of this gutter or blind ditch, or there was a negligent failure to keep the same in repair, free from obstructions, and the plaintiff was thereby injured, he is entitled to redress, though his lot is below grade. We recall no case in this court in conflict with this view, nor do we think any of the cases cited by counsel lay down a different rule. It seems to us it would be stretching the doctrine of immunity from liability to an unreasonable extent, to hold there was no responsibility on the part of the city in such a case. See *Freburg v. Davenport*, 63 Iowa, 119; *Weis v. Madison*, 73 Ind. 241; s. c., 39 Am. Rep. 135, where will be found a very able discussion of the question of municipal liability for injuries caused by surface water.

The fourth error assigned was the refusal of the court to instruct that it was the duty of the plaintiff to keep the gutter in front of his premises in proper condition, free from all obstructions, and if he failed to do this there could be no recovery. On this point the court charged, that in order for the plaintiff to recover in the action, the jury must find “that in grading Gilman street to and at its intersection with University avenue, surface water, such as is liable to accumulate in heavy rain storms, during ordinary seasons, was drawn from lands on the opposite side of the street from plaintiff's lot by means of a culvert across said street, and that it, and surface water from other sources than the street, which otherwise would not have run to the plaintiff's lot, was taken along the side of said street in a gutter to and around plaintiff's lot, and that by reason of a culvert or blind ditch in front of his lot, defective in its construction, or which was suffered to get out of repair, or fill up, such surface water overflowed or ran from such culvert upon and into the plaintiff's lot, or into his basement, to the injury of its use, and the use of his lot and dwelling.” This charge was excepted to.

It is evident that in this charge the right of recovery is made to depend upon certain essential facts. Unless the jury found that these facts existed, they were told the city was not liable. We may assume then that the facts specified in the charge were established to the satisfaction of the jury. This being the case, is not the city

responsible for the injuries to plaintiff's property occasioned by the negligent construction of the gutter or blind ditch in front of his lot, especially because it suffered it to get out of repair? It is said there was no defect in the construction of the gutter, and that the city is not liable for its being obstructed, because there is an ordinance in force, which, among other things, requires the owner of a lot abutting on a street to keep all gutters opposite his premises in good repair and free from obstructions. The learned Circuit Court said it was doubtful whether this ordinance, in relation to keeping gutters clear and in repair, applies to a covered ditch like the one in question. We are quite clear that it does not. The ordinance should be construed as relating only to the ordinary open gutters along the streets. This gutter, or rather blind ditch, was covered by the city with plank for about seventy feet, and upon the plank was thrown a small depth of earth. The ditch below the stringers which supported the plank was from ten to fifteen inches deep. It was doubtless a wise precaution for the city to cover this ditch so as to prevent teams and persons from getting into it and being injured. Such blind culverts should be under the control of the city, so that they may be kept thoroughly clean from rubbish and mud, and also to insure proper covering. They are especially dangerous places unless well covered or guarded, and the liability of the city for personal injuries would be greatly increased if lot-owners were allowed to interfere with them. The plaintiff was of the opinion that he had no right to uncover the ditch and clear it out, and we think this view was correct. There was evidence which tended to prove that the ditch was "pretty well filled up with mud and dirt." This certainly tended to show actionable negligence on the part of the city.

Another error assigned is the refusal of the court to give an instruction to the effect that if any right of action ever existed in favor of the plaintiff, by reason of the change of grade of the street, it accrued more than six years prior to the commencement of this action, and was therefore barred. There was surely no error in refusing to give this instruction. What the plaintiff complained of was in the nature of a private nuisance to his property. Whenever there was any considerable rain-fall the surface water which was brought to this blind ditch escaped from it into his basement. This was the wrong or injury done to his premises, not the change of the grade of the street.

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We think there is nothing else in the exceptions which requires special notice. There being no error in the record, the judgment of the Circuit Court is affirmed.

Order affirmed.

QUINN V. HIGGINS.

(63 WIA. 664.)

Evidence — expert — hypothetical question.

In putting a hypothetical question to an expert the party may assume as proved all that the evidence tends to prove, although the court may not regard it as proved. (*See note, p. 807.*)

ACTION for malpractice. The opinion states the case. The plaintiff had judgment below.

Silverthorn, Hurley & Ryan, for appellant.

Bardeen & Mylrea, for respondent.

TAYLOR, J. This is an action brought by the respondent to recover damages of the defendant for malpractice as a surgeon in setting and caring for a broken leg of the respondent. On the trial in the Circuit Court the respondent recovered over \$1,600 damages. Judgment was entered upon such verdict, and the defendant appealed to this court.

[Minor matters omitted.]

The question of negligence and carelessness on the part of the surgeon in the treatment he gave the plaintiff's leg, while it is one which the jury must necessarily determine upon the whole evidence in the case, is still a question which must be determined mainly upon expert evidence. Certainly the claimed misconduct of the surgeon is not so flagrant that a man entirely ignorant of surgery can form an intelligent judgment as to the propriety or impropriety of the treatment given by the defendant, unaided by evidence of men skilled in surgery and having superior knowledge as to what treatment should have been given to the broken leg under all the circumstances. The defendant was therefore entitled to show, if he could, by witnesses having superior knowledge and skill in sur-

gery, that the treatment he gave the plaintiff's leg was such as a surgeon of ordinary knowledge and skill in his profession would and ought to have given. The exclusion of any material evidence of the expert witnesses offered by the defendant which had a direct tendency to show that his treatment was proper, and such as a surgeon of ordinary learning and skill in his profession would have adopted in the case, must necessarily prejudice the defendant.

It is also assigned as error by the counsel for the appellant that the court refused to allow the expert witnesses to answer certain hypothetical questions proposed by the defendant on the trial. As to the propriety of allowing expert witnesses to give an opinion upon a hypothetical case stated, the practice has frequently been approved by this and other courts. See *Luning v. State*, 2 Pin. 215, 220; *Wright v. Hardy*, 22 Wis. 339; *Bennett v. State*, 57 Wis. 69; *Hunt v. Lowell G. L. Co.*, 8 Allen, 169; *Kempsey v. McGinniss*, 21 Mich. 123; *Woodbury v. Obear*, 7 Gray, 467. And it is clearly a more appropriate way than to allow the expert witness who may have heard the evidence in the case to give his opinion upon his understanding of the evidence so given.

The reason for permitting hypothetical questions to be propounded to an expert witness, rather than to allow him to give his opinion from hearing the evidence given in court and basing an opinion upon that, was stated by this court in *Bennett v. State*, 57 Wis. 85, 86. The reasons are stated as follows: "It is almost impossible that all the testimony given in the case, coming from many witnesses and elicited by a long examination, should be entirely uncontradictory, or should be so plain that different inferences would not be drawn by different men. And to permit an expert to give his opinion, which is to go to the jury as competent evidence, upon such a mass of testimony, without any explanation as to what state of facts such an opinion is based upon, is, in effect, taking the case from the jury and deciding it upon the understanding of the witnesses as to what facts the evidence in the case established. We think the better rule is that the jury should be clearly informed of the exact state of facts upon which the expert bases his opinion, and they certainly are not so informed when he gives his opinion upon his recollection and understanding of the whole evidence in the case; and this is especially so where the evidence is voluminous, is elicited from a large number of witnesses, and is not entirely harmonious and uncontradictory. The jury should in every case

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distinctly understand what are the exact facts upon which the expert bases his opinion. This is, perhaps, better accomplished by limiting him to answering hypothetical questions, and if it be proper, in any case, to permit an expert who has heard the testimony of a particular witness or of all the witnesses to give his opinion upon such evidence, and there be any conflict of evidence or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established by such testimony."

It does not appear very clearly, from the record in the case at bar, upon what grounds the learned Circuit judge held that the questions propounded by the appellant to the expert witnesses were incompetent or objectionable; but it seems probable, from certain intimations made by the learned judge, that the questions were objectionable because they were not based upon the facts as proved by the testimony. So far as we are able to ascertain from the record, this objection does not apply to several of the questions rejected. It may be true that the court ought not to allow hypothetical questions to be propounded to an expert witness which are plainly outside of the case and based upon a statement of facts as to which there is no pretense that they are proved by the evidence in the case. The rule in that respect must be, that in propounding a hypothetical question to the expert, the party may assume as proved all facts which the evidence in the case tends to prove, and the court ought not to reject the question on the ground, that in his opinion such facts are not established by the preponderance of the evidence. What facts are proved in the case, when there is evidence tending to prove them, is a question for the jury and not for the court. The party has the right to the opinion of the expert witness on the facts which he claims to be the facts of the case, if there be evidence in the case tending to establish such claimed facts, and the trial judge ought not to reject the question because he may think such facts are not sufficiently established.

By the COURT — The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

NOTE BY THE REPORTER. — Mr. Lawson (Expert Ev. 151) says: "The expert, in giving his opinion on a hypothetical case, must not be called upon to pass upon disputed facts." (Citing *Page v. State*, 61 Ala. 18), and "the correct rule may be stated thus: 'A medical witness who has been present

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during the whole trial, and has heard all the evidence, but had no previous knowledge of the prisoner, cannot give an opinion on the prisoner's state of mind at the time of the offense. To do so the witness would have to pass upon the truth of the testimony he has heard. But the medical man may be asked whether such and such appearances were symptoms of insanity, and whether such a fact, if it exist, is or is not an indication of insanity. Perhaps this rule has not always been observed, either in this country or in England, but it is the correct rule, and is founded upon principle and authority.'" Citing *People v. Lake*, 12 N. Y. 858; *People v. Sanchez*, 18 How. Pr. 72; *Sanchez v. People*, 22 N. Y. 147.

Mr. Rogers (Exp. Test., § 25), says: "Counsel, in framing the hypothetical question, may base it upon the truth of all the evidence, or on a hypothesis especially framed on certain facts assumed to be proved for the purpose of the inquiry. If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist." Citing *Gottlieb v. Hartman*, 8 Colo. 53; *Cowley v. People*, 83 N. Y. 464; s. c., 88 Am. Rep. 464.

In *Page v. State*, 61 Ala. 16, it was said: "The counsel on each side may put to them such states of fact as the evidence warrants, and ask an opinion thereon. The opinion on the state of facts the jury regard as proved then becomes evidence."

In *Fairfield v. Bascomb*, 85 Vt. 415, it was said: "Hypothetical questions may be so put as to require the witness to decide upon the evidence, to determine which side preponderates, and to find conclusions from the evidence, in order to reconcile conflicting facts. Such questions, though hypothetical, are as clearly improper as if they directly sought the opinion of the witness on the merits of the case. Hence in framing such questions, care should be taken not to involve so much or so many facts in them that the witness will be obliged in his own mind to settle other disputed facts, in order to give his answer. In some cases, all the facts bearing on the issue might be summed up in a single question. But when facts on one side conflict with facts on the other, they ought not to be incorporated into one question, but the attention of the witness should be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to state it. Then the jury can know all the facts and grounds on which the opinion is based." The question here held improper was in effect, if the facts stated by the witnesses on both sides are true, what in your opinion was the mental condition? As Mr. Lawson says, the question asked the witness "to assume the province of the jury," and as the court said, "It is obvious that this is all that a jury could do upon that basis." To the same effect *State v. Bowman*, 78 N. C. 509.

In *Cowley v. People*, 83 N. Y. 464; s. c., 88 Am. Rep. 464, FOLGER, C. J., said: "The claim is that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by a jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side in

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an issue of fact has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming shapes hypothetical questions to experts accordingly. And such is the correct practice."

In *Davis v. State*, 35 Ind. 496, it was said that "if the facts are in dispute * * * it seems to be proper to allow counsel to base their questions upon the facts which the evidence tends to prove, and let the jury decide ultimately whether they are established by the evidence or not." In *Bishop v. Spinnig*, 38 Ind. 143, "The party seeking an opinion in such a case may within reasonable limits put his case hypothetically as he claims it to have been proved, and take the opinion of the witness thereon, leaving the jury of course to determine whether the hypothetical case put is the real one proved." In *Guetig v. State*, 66 Ind. 94, "The expert cannot give his opinion upon evidence; it must be done upon admitted, proved, or assumed facts." "In stating a hypothetical case, it is not necessary to assume all the facts which the evidence tends to prove, as claimed on behalf of the appellant, but all the facts assumed must be supported by some evidence."

An error in the assumption as to the evidence does not render the question objectionable, if it is within the possible or probable range of the evidence. *Hartnett v. Garvey*, 68 N. Y. 641; *Nave v. Tucker*, 70 Ind. 15.

There must be evidence tending to prove the matters stated in a hypothetical question. But "it is the privilege of counsel in such cases to assume within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purpose of the question and for no other purpose." *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47. If the facts stated in hypothetical cases are not proved, the opinion of course goes for nothing.

Where there is any evidence tending to prove the facts assumed, it is for the jury to weigh the evidence, and determine whether the supposed facts so stated actually correspond with the facts as proved.

In *Boardman v. Woodman*, 47 N. H. 120, 135, the court approved "a hypothetical case stated to the witness, and so proved as to resemble as near as may be the case under consideration. The jury can judge whether the case supposed is so far like the one they are considering as that the opinion of the expert on the supposed case is any guide to them in settling the question which they are to decide." To same effect, *Lake v. People*, 1 Park. Cr. 495; s. c., 12 N. Y. 858; *Thornton v. People*, 2 Park. Cr. 49, 188. In *People v. Lake*, HAND, J., said: "I think they had a right to put hypothetical questions to those medical witnesses, predicable of the facts then proved, or that may be fairly claimed to have been proved in the cause."

NEWMAN V. WATERMAN.

(63 Wis. 612.)

Will — child omitted — estoppel by probate.

A child and heir at law of a testator, for whom his father has by mistake failed to provide by the will, but who, being of full age, has appeared in proceedings resulting in a judgment establishing the will, cannot recover land thereby devised.

EJECTMENT. The head-note shows the point sufficiently. The plaintiff had judgment below.

Jas. O'Neill and L. A. Doolittle, for appellant.

R. J. MacBride and B. F. French, for respondent.

CASSODAY, J. In ejectment, the party having the legal title, with the right of immediate possession, must prevail. As sole heir at law of his father, the plaintiff claims such title and right of possession. Both are denied. Had the father died intestate, the plaintiff's claim would have been manifest. Then he would have shown a right to the possession "as heir." § 3079, R. S. But the father did not die intestate. It is admitted that he left a will. By the will he gave, devised, and bequeathed all his estate, both real and personal, to his step-daughter, one of the defendants. The will was proved in the County Court, and was by that court admitted to probate, established as a valid will, and ordered to be recorded. From that judgment of the Probate Court the plaintiff appealed to the Circuit Court. Upon the trial of that appeal the will was re-proved in solemn form, and thereupon it was ordered, adjudged, and decreed by the Circuit Court that the judgment of the County Court admitting the will to probate be, and the same was thereby, affirmed, and the instrument was thereby allowed, and the probate thereof granted, as the last will and testament of said deceased.

The serious question here presented is as to the effect of that judgment upon this action. At common law the probate of a will was conclusive as to the personal property, but was no evidence as to the execution or validity of the will, so far as it affected real property. 1 Daniell Ch. Pr. 877; Abb. Tr. Ev. 110. At common law, and as to real estate, the will itself, on being duly proved in an

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action of ejectment or other suit affecting the title to realty, became a muniment of title. *Colton v. Ross*, 2 Paige, 396; s. c., 22 Am. Dec. 648; *Bowen v. Idley*, 6 Paige, 46; *Brady v. McCosker*, 1 N. Y. 214; *Boylan ads. Meeker*, 28 N. J. L. 274, 303. But that has been changed by statute in England, as well as several of the States. 1 Daniell Ch. Pr. 877; 1 Jarm. Wills, 50; Abb. Tr. Ev. 110, subd. 60. In this State no will is effectual to pass either real or personal estate unless it has been duly proved and allowed in the County Court, as provided by the statutes, or on appeal in the Circuit Court, or in the Supreme Court (except as to wills proved and allowed outside of the State), and the probate of a will of real or personal estate, as provided in our statutes, is expressly made "conclusive as to its due execution." § 2294, R. S. When proved and allowed, a certificate thereof is to be indorsed thereon, or annexed, signed by the judge of the County Court and attested by the seal of such court. Such attested copy of every will devising lands or any interest therein, and of the probate thereof, is to be recorded in the office of the register of deeds. § 2296. This indicates that the certified and attested copy of the will is to be treated as a conveyance.

Another section of the statutes declares "that every devise of land in any will shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall appear by the will that the devisor intended to convey a less estate." § 2278. Under this section it has, in effect, been held that where there is an absolute, unconditional devise, the devisee takes at once on the death of the testator. *In re Pierce*, 56 Wis. 560; *Schrivver v. Meyer*, 19 Penn. St. 87; s. c., 57 Am. Dec. 634; *Abbott v. Pratt*, 16 Vt. 626. This may include lands acquired after making the will (§ 2279), and the homestead (§ 2280), *Ferguson v. Mason*, 60 Wis. 387. In the case before us there is no intervening estate. The devise to the step-daughter is direct, absolute, and unconditional. She therefore, as sole devisee, took the legal title to the real estate in question at once on the death of the testator. Thus her right and title to the land in question became complete at law before the commencement of this action. The probate of the will being made by statute "conclusive as to its due execution," as well in respect to real estate as personal property, and plaintiff, as heir, having appeared in the probate proceedings, thus giving to that court complete jurisdiction, it would seem that he can no longer have any standing in an action of ejectment to try the naked legal title, unless his right to do so was in some way

saved by statute. The conclusiveness of judgments of probate has often been declared, and cannot reasonably be questioned. *Archer v. Meadows*, 33 Wis. 166; *Freem. Judgm.*, §§ 319a, 608.

Was the plaintiff's right to maintain this action against the devisee, notwithstanding the probate of the will, saved by statute? There is no claim that the will was ever revoked in any of the ways designated in section 2290, R. S., *Will of Ladd*, 60 Wis. 190; s. c., 50 Am. Rep. 35; nor that there was ever any "revocation implied by law from subsequent changes in the condition or circumstances of the testator," as therein excepted. Were it claimed that the will in question had been revoked in any of the ways mentioned in that section, or by implication of law, the question would arise whether the party alleging such revocation was not bound to avail himself of the objection in the probate proceedings, or be forever precluded from attacking the will collaterally on any such ground? According to Mr. Freeman he would. § 608. It has been held that the probate of a will could not be collaterally avoided on the ground that the will was a forgery. *Moore v. Tanner's Adm's*, 5 T. B. Monr. 45; *Rex v. Vincent*, 1 Strange, 481; *Allen v. Dundas*, 3 Durnf. & E. 125; *Priestman v. Thomas*, 9 Pro. Div. 210. So it has been held that it could not be collaterally avoided on the ground that the will so admitted to probate had been procured by fraud or undue influence, *Archer v. Meadows*, 33 Wis. 167; nor that it had been revoked by the subsequent execution of another will. *Davis v. Gaines*, 104 U. S. 386, and cases there cited; but see *Waters v. Stickney*, 12 Allen, 1, and cases there cited; nor collaterally impeached on any other ground, *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; nor set aside by proceedings in chancery. *Archer v. Meadows*, 33 Wis. 166; *Colton v. Ross*, 2 Paige, 396; s. c., 22 Am. Dec. 648; *Bowen v. Idley*, 6 Paige, 46; *Brady v. McCosker*, 1 N. Y. 214; *Priestman v. Thomas*, *supra*. But see cases cited in *Waters v. Stickney*, *supra*, and *Harris v. Tisereau*, 52 Ga. 153.

Where, after making his will, the testator has a child born to him for whom no provision is made therein, such child has the same share in the testator's estate as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estates, unless it be apparent from the will that it was the intention of testator that no provision should be made for such child. Section 2286, R. S.; *Bressee v. Stiles*, 22 Wis. 120; *Bowen v. Hoxie*, 137 Mass. 527; *Chicago, etc., R. Co. v.*

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Wasserman, 23 Fed. Rep. 872; *Willard's Estate*, 68 Penn. St. 327; *Talbird v. Vordier*, 1 Dessaus. 592; *Holloman v. Copeland*, 10 Ga. 79; *Potter v. Brown*, 11 R. I. 232; *Waterman v. Hawkins*, 63 Me. 156; *Evans v. Anderson*, 15 Ohio St. 324.

The claim here is that the testator omitted to provide in his will for the plaintiff, and that it "appeared" from the oral evidence taken on the trial in this action, "that such omission was not intentional, but was made by mistake or accident," and hence that the plaintiff is entitled to "have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding (§ 2286) section." § 2287; *Wilson v. Fosket*, 6 Metc. 400; s. c., 39 Am. Dec. 736; *Converse v. Wales*, 4 Allen, 512; *Doane v. Lake*, 32 Me. 268; s. c., 52 Am. Dec. 654; *Gifford v. Dyer*, 2 R. I. 99; s. c., 57 Am. Dec. 708; *Ramsdill v. Wentworth*, 101 Mass. 125; s. c., 106 Mass. 320; *Buckley v. Gerard*, 123 Mass. 8; *Case v. Young*, 3 Minn. 209; *Pearson v. Pearson*, 46 Cal. 609; *Wilder v. Thayer*, 97 Mass. 439; *Hurley v. O'Sullivan*, 137 Mass. 86. The "mistake or accident," here mentioned, manifestly need not appear on the face of the will itself, as in the preceding section. This has been held in several of the cases cited. Some have apparently held the other way, but under different statutes. *Gifford v. Dyer*, 2 R. I. 99; s. c., 57 Am. Dec. 708; *Wetherall v. Harris*, 51 Mo. 65; *Bush v. Lindsey*, 44 Cal. 121.

The question recurs, at what stage of the proceedings, and in what form must such unintentional omission be made to appear? Can the heir who has reached his majority, after having appeared in the probate proceedings and allowed judgment admitting the will to probate without objection, raise the question for the first time in an action of ejectment against the devisee? It will be observed that under each of these sections such omitted heir is to "have the same share in the estate of the testator as if he had died intestate, to be assigned" "to him as provided by law in case of intestate estates." §§ 2286, 2287, R. S. "When any share of the estate of a testator shall be assigned," as provided in either of those sections, "the same shall first be taken from the estate not disposed of by the will, if any; if that shall not be sufficient, as much as shall be necessary shall be taken from all the devisees or legatees in proportion to the value of the estate they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in

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the will would thereby be defeated; in which case such specific devise, legacy, or provision may be exempted from such apportionment and a different apportionment may be adopted in the discretion of the County Court." § 2288, R. S. The share of the estate which is to be assigned to the omitted child of the testator as if he had died intestate, as provided by law in case of intestate estates, under sections 2286, 2287, is evidently to be so assigned by an "order or judgment" of the "County Court." §§ 3940-3955. That such assignment to such omitted child is, in contemplation of the statutes, to be made by the County Court, is quite apparent from other sections, which provide in effect that "when the estate given by any will shall be liable for the payment of debts and expenses, as mentioned in" section 3864, or is liable to be taken to make up the share of a child omitted from the will, as provided in section 2286 or 2287, "the executor shall have the right to retain the possession of the same until such liability shall be settled by order of the County Court, and until the devises and legacies so liable shall be accordingly assigned by order of such court; and when the same can be properly done, any devisee or legatee may make his claim to such court to have such liability settled and his devise or legacy assigned to him." § 3865. "All the devisees or legatees who shall, with the consent of the executor or otherwise, have possession of the estate given to them by will before such liability shall be settled by the County Court, shall hold the same subject to the several liabilities mentioned in the preceding section and shall be held to contribute according to their respective liabilities," etc. § 3866. "The County Court may, by judgment for that purpose, settle the amount of the several liabilities as provided in the preceding sections, and adjudge how much and in what manner each person shall contribute, and may issue execution to enforce its judgment as circumstances may require. The claimant may also have a remedy by any proper action." § 3868.

The several sections of the statutes cited clearly contemplate that such after-born child, or child omitted by the testator from his will through "mistake or accident," shall have the remedies provided for in the County Court. The remedies provided are in the nature of settlements and partitions between several claimants, and assignments and distributions of the estate. In case there are other heirs, or an heir at law, besides the one omitted, there must

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almost necessarily be adjustment and contribution. Such remedies are necessarily equitable in their nature, and peculiarly within the province of the County Court. *Brook v. Chappell*, 34 Wis. 405; *Appeal of Schaffner*, 41 Wis. 260; *Catlin v. Wheeler*, 49 Wis. 507; *Application of Wilber*, 52 Wis. 297; *Gardner v. Estate of Callaghan*, 61 Wis. 96. True, the section of the statutes last cited also secures to the claimant "a remedy by any proper action." But the additional remedy thus secured is, after all, limited to a "proper action." Ejectment does not seem to be a proper action under any circumstances. Where the only heir of the testator is a child born after making the will, or one who was unintentionally omitted therefrom through mistake or accident, and for that reason claims the entire estate of the testator, and such claimant has reached his majority and has notice of the hearing, it would seem to be eminently proper that such claim should be presented and heard at the time of the application for probate, for if the claim should be established, it would work a complete revocation of the whole will, or at least the disposing parts of the will, and render it entirely inoperative as a transfer of property. The fact whether there had or had not been such revocation can more appropriately be determined at the hearing of the probate than any other stage of the proceedings. Certainly there are adjudications where portions of a will have been admitted to probate, and other portions rejected altogether. But whether the claim must necessarily be presented at that stage of the proceedings, or may be presented in the County Court, or by proper action after the will has been admitted to probate, are questions not necessarily before us, and upon which we express no opinion.

In the case of *Ladd's Will*, already mentioned, a class of cases was cited where the testator had been deceived by the legatee or devisee into the belief that he had done an act sufficient to revoke his will, when in fact he had not, and in which it was held that although there was, under the statute, no revocation, yet in equity such legatee or devisee would be decreed to hold the property as trustee for the heir. 60 Wis. 192, 193. But we gave no opinion there on the subject; and give none here. In several of the cases cited the claim was made on petition in the Probate Court, and some of them on the hearing of the probate in the first instance, or on appeal from the judgment of probate. *Wilson v. Fosket*, 6 Metc. 400; *Converse v. Wales*, 4 Allen, 512; *Doane v. Lake*, 32 Me.

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268; *Gifford v. Dyer*, 2 R. I. 99; *Willard's Estate*, 68 Penn. St. 327; *Wetherall v. Harris*, 51 Mo. 65; *Holloman v. Copeland*, 10 Ga. 79. Some of the cases were in proceedings for partition or distribution. *Ramsdill v. Wentworth*, 101 Mass. 125; *Buckley v. Gerard*, 123 Mass. 8; *Guitar v. Gordon*, 17 Mo. 408; *Clarkson v. Clarkson*, 8 Bush, 655; *Waterman v. Hawkins*, 63 Me. 156; *Pounds v. Dale*, 48 Mo. 270; *Schneider v. Koester*, 54 Mo. 500; *Case v. Young*, 3 Minn. 209; *Wilder v. Thayer*, 97 Mass. 439; *Hurley v. O'Sullivan*, 137 Mass. 86. Some of the cases were on bills in equity to reach and obtain the distributive share of the claimant, or for a construction of the will, or to quiet title. *Talbird v. Verdier*, 1 Desaus. 592; *Gerrish v. Gerrish*, 8 Or. 351; *Potter v. Brown*, 11 R. L. 232; *Chicago, etc., R. Co. v. Wasserman*, 22 Fed. Rep. 872; *Bowen v. Hoxie*, 137 Mass. 527; *Brush v. Wilkins*, 4 Johns. Ch. 506. One case was an action of debt upon the bond of the executor after having failed to pay as ordered by the Probate Court. *Waterman v. Hawkins*, 63 Me. 156; *Breese v. Stiles*, 22 Wis. 120, was an action of ejectment brought by a devisee against the after-born children and others; and the plaintiff was defeated on the ground that the proceedings in the County Court, as to the will and the estate, were void as against the minors for want of jurisdiction. To the same effect is *Woodward v. Spiller*, 1 Dana, 179; s. c., 25 Am. Dec. 139.

That the plaintiff has not mistaken his remedy and may maintain ejectment, counsel cite and rely upon *Evans v. Anderson*, 15 Ohio St. 324. That was on demurrer to the original petition to recover possession of lands. Whether the petition sought equitable relief, or was solely in the nature of ejectment, does not appear from the report; but we assume the latter. In that case the petitioner was born about five months after the death of the testator, and about two months after the will had been admitted to probate. The court expressly distinguished the case from one "where the probate of the will is to be impeached, or its validity is to be attacked, on account of a defective execution, or on grounds that existed and were cognizable by the court when it was proved. In either case it must be done by direct contest. But it must be observed that there is a wide distinction between such a case and this. This will was properly admitted to record * * *

The devisee held the title under a valid will, subject to the condition imposed by the statute that the will should become void on

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the birth of a subsequent child. The will was executed subject to the contingency of being avoided by the birth of a child. It was admitted to probate subject to the same contingency. The will was good until the birth of the child. If it had not been born alive it would still be good. By his birth the will became void." It is very plain that in that case, as held by this court in *Bresce v. Stiles*, 22 Wis. 120, the probate was void as against the unborn child for want of jurisdiction. In fact, the opinion of the court in the Ohio case is an authority against the maintenance of this action. Here the validity of the will and its probate is collaterally attacked and impeached "on grounds that existed and were cognizable by the court when it was proved;" in which case it is there said, "it must be done by direct contest."

I have only found three adjudications in which actions of ejectment have been maintained in cases similar to this. *Gage v. Gage*, 29 N. H. 533; *Smith v. Robertson*, 89 N. Y. 555; *Pearson v. Pearson*, 46 Cal. 609; s. c., 51 Cal. 120. In the New Hampshire case the action was brought by the grantee of the omitted heir, and there were questions involved over which the Probate Court had no jurisdiction. Besides, there existed in that State a statute which made the will absolutely void as to a child not named or referred to in the will, and was otherwise unlike our statutes as to the remedy. In the New York case here cited the action was brought in the interest of a child born after the making of the will, and only a month before the death of the testator, and under a statute expressly reserving the right of action as to real estate, and otherwise unlike ours. We cannot regard either of these cases as an authority against our view of this case. In the case of *Pearson v. Pearson*, *supra*, cited by counsel on another point, the plaintiff was born October 10, 1850, and was the daughter of the testator and a former wife from whom he had been divorced. The testator made his will January 3, 1865, and died January 10, 1865. The will was admitted to probate, and June 4, 1866, a decree of distribution was made. The plaintiff was not mentioned in the will; and her action was commenced and tried in 1871, and before she was twenty-one years of age. The judge writing the opinion discusses the question we have been considering, and concluded: "I am therefore of opinion that if there was no surviving wife, or other issue of the testator than the plaintiff, she might maintain ejectment, if there be no pending administration of the estate."

46 Cal. 625. The opinion then went on to show that there was sufficient evidence that the testator left him surviving, a wife and six other children, who were the devisees in his will, and concluded that the plaintiff took title by descent and became a tenant in common with the devisees. Page 627. The court then determined that the plaintiff was not estopped by the decree of distribution from claiming her share of the estate, because as to her it was void for want of jurisdiction over her person by reason of the failure to make the requisite service, or to give the requisite notice, or to secure the appearance of the plaintiff in the case. The cause was reversed, and on a retrial the plaintiff recovered under the statutes the undivided one-seventh of two-thirds of the demanded premises; and that judgment was affirmed on appeal. s. c., 51 Cal. 120.

The sections of the statutes of that State, there under consideration, were quite similar to our sections 2286-2288; but their statutes did not seem to have the other provisions of our statutes cited; and did contain a provision that if no person, within one year after the probate of a will, contested the same, or the validity thereof, such probate should be conclusive; *saving to infants*, married women, and persons of unsound mind, a like period of one year after their respective disabilities should be removed. Wood Dig. Cal. Stats., pp. 394, 395, § 36 (1858); Code Civil Proc. Cal., p. 352, § 1333 (1872); 2 Hittell (1876), (§ 1333), 11333. In that case the action was commenced and tried during the plaintiff's infancy; hence, as to her, probate was not conclusive under the statute. The difference in the statutes of that State and ours seems to be sufficient to distinguish the two cases; but were it otherwise, we should not be inclined to follow it in a case like this.

The difficulty in maintaining an action of ejectment against the devisee to try the naked legal title in a case like this, and under our statutes, seems to be manifest. The fact upon which it is sought to invalidate the will, and the probate of it, existed, if at all, at the time of making the will, and was known to the plaintiff at the time of the probate of the will. The evidence of its existence, if any, was entirely *dehors* the will and the record of its probate, and rested wholly in parol. Independent of such evidence, the will was valid, and its probate conclusive upon the plaintiff. The fact relied upon to invalidate the will and probate was the alleged mistaken belief of the testator, at the time of executing the will, that his son was

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then dead. Had the testator known at that time that his son was then living, it is claimed that he would not have made any will at all, or at most, a different one. By reason of such parol evidence of such mistaken notion then existing wholly in the mind of the testator, it is claimed that the solemn act of dictating and executing the will, followed by the still more solemn act of proving, and then re-proving the will in the presence of the plaintiff, and the adjudication of probate remaining unimpeached, are each and all to be treated as absolutely null and void, even when the question arises collaterally in an action at law to try the naked legal title. But wherein is such mistaken notion in the mind of the testator at the time of executing the will more vicious and effectual against the judgment of probate than a misconception or false belief in the mind of such testator as to the friendship or enmity or overt acts of some of his children, induced by the fraud or undue influence of a devisee or legatee at or prior to the time of making the will? Yet as to such questions as this, this court has held the probate is conclusive against any collateral attack.

As we have seen, other courts have gone still further, and held the probate conclusive against any collateral attack as to the forgery of the will or the existence of a later will, or any of the enumerated grounds of revocation. To allow such omitted child to take under the statutes of descent, when the testator has, by will in form, disposed of all his estate, both real and personal, and such will has been admitted to probate, so that the devisee's right to the land has become as complete at law as a conveyance to him from the testator would have been, there must necessarily be a partial or absolute revocation of both the will and the probate. If this can be done at all in a case like this, where the will has been admitted to probate, of which we express no opinion, it would seem that it should be done in some direct proceeding, or proceeding calling into exercise the equitable powers of the court, and not by collateral attack in an action at law to try the naked legal title. *Holden v. Meadows*, 31 Wis. 284; *Archer v. Meadows*, 33 Wis. 166; *In re Estate of Holden*, 37 Wis. 98; *Waters v. Stickney*, 12 Allen, 1; *Richardson v. Hazelton*, 101 Mass. 108; *Harris v. Tisereau*, 52 Ga. 153; *McArthur v. Scott*, 113 U. S. 340, and cases there cited.

By the COURT — The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Motion for a rehearing denied.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
OREGON.

QUIGLEY v. McKEE.

(13 Oreg. 22.)

Slander — actionability of words per se.

Falsely to say of another that he is a thief is actionable *per se*, although it does not necessarily impute a felony.

SLANDER. The opinion states the case. The defendant had judgment below.

A. Lenhart, for appellant.

James Gleason, for respondent.

WALDO, C. J. This is an action of slander for calling the plaintiff a thief. The obvious import of this language was to impute to the plaintiff the felonious taking of property, or larceny, *Dunnell v. Fiske*, 11 Metc. 554, and the words are actionable though the defendant meant but to impute petit larceny; for “to accuse one of petit larceny will bear action, and for that the offender shall be whipped.” *Whitacre v. Hillidell*, Aleyn, 11. This is still good law, though the offender be no longer whipped. The material element which lies at the foundation of the action of slander is social

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disgrace, or damages to character in the opinion of other men. *Sheffill v. Van Deusen*, 13 Gray, 304; 1 Am. Lead. Cas. (5th ed.) 113. The observations in *Harrison v. Thornborough*, Gilb. Cas. 117, rest on this principle: "PARKER, C. J.," runs the report, "remembered a saying of TREBY, C. J., that people should not be discouraged that put their trust in the law; for if men could not have a remedy at law for such slanders, they would be apt to carve it for themselves, which would let in all the ill consequences of private revenge." *Naben v. Micoock*, Skin. 183. Now, "if people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself and thus avoid the greater evil of private retribution." Holmes Com. Law, 41, 42.

In *Krebs v. Oliver*, 12 Gray, 239, it was held actionable to impute a crime, although the party had, as alleged, suffered the penalty of the law, or was no longer exposed to the danger of punishment. BIGELOW, J., cited, with other cases, *Boston v. Tatam*, Cro. Jac. 623, where it was said: "And it is a great slander to be once a thief, for although a pardon may discharge him of the punishment, yet the scandal of the offense remains; for *pæna potest redimi; culpa perennis erit*." In *Jones v. Herne*, 2 Wils. 87, WILLES, C. J., said that if it were now *res integra*, he should hold calling a man a rogue or a woman a whore, in public company, were actionable. But if this were so it should seem, according to the formative principles of the common law, that all other words uttered in public company that "sound in great discredit of the plaintiff," or cast a stain on his character, should in like manner be actionable. A practical standard must be fixed and a limit necessarily arbitrary be put somewhere to these actions, else there were cause for the fears of Chief Justice VAUGHN in *King v. Lake*, 2 Vent. 28 that "the growth of these actions would spoil all communications."

The rule in Massachusetts seems to be that words generally are actionable in themselves when they impute an offense to which the law attaches a disgraceful or infamous punishment, or impute a punishable offense of a disgraceful or infamous character. *Miller v. Parrish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1; *Kenney v. McLaughlin*, 5 Gray, 5; s. c., 66 Am. Dec. 345; *Krebs v. Oliver*, 12 Gray, 239; *Buckley v. O'Neil*, 113 Mass. 193; *Pollard v. Lyon*, 91 U. S. 232, 233; *Onslow v. Horne*, 3 Wils. 177; 1 Am. Lead. Cas. 98.

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It is said that malice is an essential ingredient in slander. There is a singular and practical illustration of this principle in *Brook v. Montague*, Cro. Jac. 91, where COKE, arguing at the bar, cited a case where a parson in a sermon "recited a story out of Fox's Martyrology, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God, whereas in truth he never was so plagued and was himself present at that sermon." Greenwood thereupon brought an action against the parson, "but WRAY, C. J., delivered the law to the jury that it being but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty." It is doubtful if malice would now be taken so literally to be the gist of the slander. Add. Torts, §§ 40, 1090; Holmes Com. Law, 138; 16 Am. Law Rev. 318.

When we come to slander affecting a man in his employment or trade, the ground of the action is different. Here injury to livelihood, through the instrumentality of injury to character, is the sole object to which the attention of the law is directed. "The law is very tender of people's employments and professions." *Gyles v. Bishop*, 1 Freem. 279. Where the court can see without the aid of a jury that the slanderous words must prove injurious, they will be actionable within themselves. The plaintiff in such case will be entitled at least to nominal charges. *Webb v. Portland Manuf. Co.*, 3 Sum. 192.

It is not necessary to prove that the slanderous words were spoken on the day laid in the complaint. It is sufficient to prove that they were spoken before the commencement of the action, and are not barred by the statute of limitations. *Potter v. Thompson*, 22 Barb. 87.

Judgment reversed.

In re Leonard.

IN RE LEONARD.

(12 Oreg. 98.)

Attorney — woman as.

A woman may not be admitted to practice as an attorney in Oregon, although she founds her application on a certificate of her admission in Washington Territory. (*See note, p. 325.*)

MOTION for admission as an attorney. The opinion states the case.

E. B. Watson, for motion.

PER CURIAM. A motion has been made and submitted herein for the admission of Mary A. Leonard as a member of the bar of this court, founded upon certificate of her admission to the Supreme Court of Washington Territory. The statute of this State, applicable to the admission of attorneys, provides that "an applicant for admission as an attorney must apply to the Supreme Court, and must show, (1) that he is a citizen of the United States and of this State, and of the age of twenty-one years, which proof may be made by his own affidavit; (2) that he is a person of good moral character, which may be proved by any evidence satisfactory to the court; (3) that he has the requisite learning and ability, which must be shown by the examination of the applicant by the judges, or under their direction, in open court, at the term at which the application is made." Code, § 1003. There is no provision for the admission to the court upon a certificate of admission as attorney to the courts of another State or country, except as provided in section 1005 of the Code, which reads as follows :

"Whenever it appears that a person of any other State or country is an attorney of the highest court of record of such State or country, he may appear as counsel for a party in a particular action, suit, or before a judicial officer of this State, but not otherwise."

Yet the courts, both Supreme and Circuit, have followed the practice of admitting attorneys upon certificate of admission to the courts of other States, Territories, and foreign countries, without examination, and in many instances, without proof of good moral character. Such practice is authorized by the rules of this court,

but is not sanctioned by any statute of the State, and has been tolerated by an exuberance of liberality exercised by the bench and bar. It is doubtful, indeed, whether the courts ought to exhibit such extraordinary comity, and whether it does not contravene the policy of the State; but it is difficult for lawyers to be illiberal in such matters, and a very questionable practice has grown up in consequence.

The application in this case is somewhat unusual. The applicant has produced a certificate of admission to the courts of Washington Territory, which under the practice referred to would ordinarily be regarded as sufficient to entitle a person to admission as an attorney. But the applicant being a woman, the court is in doubt whether it has the right to admit her. The question is not free from embarrassment, and the court would gladly avoid the responsibility of determining it. Courts however have no discretion in such cases. They are compelled to follow precedents, as they are evidence of what is law. In a very able opinion delivered by the late chief justice of the Supreme Judicial Court of the State of Massachusetts, now an associate justice of the Supreme Court of the United States, it was held that an unmarried woman was not entitled, under the then existing laws of the Commonwealth, to be examined for admission as an attorney and counsellor of that court. Case of *Robinson*, 131 Mass. 376; s. c., 41 Am. Rep. 239. The learned judge in that case gave the subject a very thorough examination, cited a great number of authorities, and arrived at the conclusion stated. Upon a reference to those statutes it will be found that they do not materially differ from ours in regard to the civil and political status of women, and consequently the authority is directly in point. It follows therefore that the same construction of the latter statutes would render women ineligible to become attorneys in this State. If that view be correct, this court would not be justified in admitting a woman as an attorney upon a certificate of admission to the courts of another State or country. This is the first application of the kind in this State that the court has any cognizance of, and it is very generally understood that women are disqualified from holding such positions. The legislative assembly has not manifested any intention by any act it has adopted to confer such a right upon them, and it would be highly improper for the courts of the State to take the initiative in so important a movement. Their province is to follow, and not to attempt to go in advance of legislative action in such affairs. Whenever the latter authority

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adopts an enabling act empowering the courts to admit women to the bar, or confers upon that sex other rights, it will be the duty of the former to exercise the power granted, and maintain the rights conferred.

The court is of opinion that it has no authority under the existing laws of this State to admit women as attorneys of this court, and the application is therefore denied. *Motion denied.*

NOTE BY THE REPORTER.—The General Term of the Supreme Court of New York State, in the third department, have denied Miss Kate Stoneman's application for admission to the bar. Miss Stoneman, the court said, was "well qualified for admission" except that her sex was against her.

Judge LANDON, delivering the opinion, said: "The statute, Code C. P., section 56, prescribes regulations and provides for rules to be observed in the case of 'a male citizen of the State of full age hereafter applying to be admitted to practice as an attorney and in the courts of record of the State.' The expression 'male citizen' implies the legislative exclusion of a female citizen from this office. An attorney and counsellor is an officer of the court. A public office is a position of trust and responsibility, and it is within a legislative competency to define in the public interest the conditions essential to personal eligibility. That none but qualified persons should be permitted to pursue certain employments, as lawyers, physicians, druggists and pilots, seems to be a proper governmental regulation in the public interest. More recently the propriety of exacting special qualifications as the condition of eligibility to certain public offices has in the civil service laws received State and National legislative sanction. Such laws rest upon the basis that the public welfare is superior to the personal right of disqualified individuals to engage in these employments or hold these offices.

"The right to practice law, it was held by the Supreme Court of the United States, is not a privilege of a citizen of the United States within the meaning of the fourteenth amendment of the United States Constitution, *Bradwell's case* affirming the decision of the court of Illinois in the case cited. The power of the court to admit attorneys and counsellors is not in this State an incident to its general jurisdiction, but since the organization of the State has been exercised either under the express provisions of the Constitution or of statutes. The Constitution of 1777 provides that 'all attorneys, solicitors and counsellors at law hereafter to be appointed — be appointed by the court and licensed by the first judge of the court in which they shall respectively plead or practice and be regulated by the rules and orders of the said court.' The rules adopted are found in Coleman and Caine's cases. The second Constitution, adopted in 1822, omitted any reference to this subject, but in 1823 a statute was passed which was subsequently incorporated in the Revised Statutes which provided that 'counsellors, solicitors and attorneys shall be appointed and licensed to practice by the several courts of law and equity,' and providing that the Supreme Court should prescribe rules for admission in that court and the chancellor in the Equity Court.

"The Constitution of 1846 contained the provision: 'Any male citizen of the

age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning, shall be entitled to practice in all the courts in this State.' This provision was inserted because it was thought the rules of admission prescribed by the courts were too rigid. By reference to the debates it cannot be discovered that the use of the word 'male' was other than as a matter of course. It elicited no comment. This provision, after some discussion, was adopted in place of a proposed provision that the courts should not 'prohibit any citizen from practicing as an attorney and counsellor in any court except for want of good moral character.' The amended sixth article of the Constitution, which went into effect in 1870, omitted this provision. Before this time the propriety of admitting women to practice began to be discussed. It is understood that in Iowa a woman was admitted in 1869. The propriety of admitting women to practice must have been present to the mind of the legislature of 1871, by which the law now forming the section of the Code of Civil Procedure first above cited was enacted. The word 'male' was re-enacted in the Code of 1876. If the legislature had intended to extend eligibility to women the word 'male' would not have been continued in the Code, since the Constitution of 1870 gave the power to reject it.

"In view of our peculiar constitutional and legislative enactments, the action of other States serves to indicate the growth of liberal opinion in those States but does not much aid us in the construction of our own law. In Massachusetts, in 1881, a similar application was denied under a statute which used the words 'a citizen,' in defining eligibility. The legislature of the Commonwealth has since by statute extended the privilege to women. In Connecticut, under a statute allowing 'such persons as are qualified therefor,' to be admitted, the Supreme Court in 1882 granted the application of a woman. In Illinois the court denied such an application, but the legislature subsequently changed the law. Also in Wisconsin, the legislature subsequently changed the law. The United States Court of Claims refused to admit a woman. The United States Supreme Court also refused. A recent newspaper item states that forty-eight women have been admitted to the bar in the United States who are engaged in the practice of the profession or in the work connected with it. The first admission was in Iowa, in 1869. The States and the order in which they were admitted are as follows: Iowa, 8; Missouri, 2; Michigan, 6; Utah, 1; District of Columbia, 8; Maine, 1; Ohio, 4; Illinois, 7; Wisconsin, 5; Indiana, 2; Kansas, 8; Minnesota, 1; California, 8; Connecticut, 1; Massachusetts, 1; Nebraska, 1; Washington Territory, 1; Pennsylvania, 1. It would be possible, by starting with the postulates, that citizenship implies eligibility to office, and that the extension of eligibility to males is not the denial of it to females to reach the conclusion that since females are not expressly excluded their eligibility exists. Such reasoning is specious but unsound, and fails to take notice of the fact that in this respect a change in our laws does not, without special legislative action, follow a change in public opinion, if indeed, as we are quite willing to be convinced, public opinion has changed. Our conclusion is that under the existing laws in this State the application must be denied."

See *Hall case*, 50 Conn. 181; s. c., 47 Am. Rep. 625; *Robinson's case*, 181 Mass. 876; s. c., 41 Am. Rep. 289.

Hackett v. Multnomah Railway Company.

HACKETT V. MULTNOMAH RAILWAY COMPANY.

(12 Oreg. 124.)

Corporation — joint ownership of ferry — accounting.

A corporation may be a joint owner of a ferry and have an accounting.

THE opinion states the case.

James G. Chapman and E. D. Shattuck, for appellant.

C. B. Bellinger, J. M. Gearing and P. L. Willis, for respondent.

LORD, J. This case consists of two suits consolidated and heard as one in the court below, one of which was commenced by M. A. Hackett against the Multnomah Railway Company, J. H. Foster and J. H. Moore, in which M. A. Hackett claims to be the sole owner of the property known as the "Albina Ferry," a ferry plying on the Willamette river between Portland and Albina, and asks that said company, and Moore and Foster, be restrained and enjoined from interfering with M. A. Hackett in the use of said ferry property, and that they account to him for tolls he alleged that they had received therefrom. Moore and Foster claiming no interest in the property, made default, and the Multnomah Railway Company answered, claiming a two-thirds interest in the property, and asking the appointment of a receiver. The other suit was commenced by the Multnomah Railway Company against M. A. Hackett and Nathan Hackett, in which the company claims that it is the owner of two-thirds of said ferry property, and that said Hacketts are each owner of one-sixth thereof, and asks that the Hacketts be restrained from interfering with it in the exercise of its rights as such owners. Nathan Hackett answered, disclaiming any interest, and M. A. Hackett answered, claiming the whole. In October, 1880, the ferry license was granted by the County Court to M. A. Hackett and Norman Finch for the period of five years; subsequently the Multnomah Railway Company succeeded, by mesne conveyances, to two-thirds interest in the ferry; and from the time of such purchase until the present suits were instituted, M. A. Hackett (and in the same way Nathan Hackett) and the Multnomah Railway Company have operated the ferry by virtue of their joint

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propriatorship in the premises. The conclusions of fact and law, as found and determined by the court below, were against Hackett and in favor of the Multnomah Railway Company and hence this appeal by M. A. Hackett.

The counsel for the appellant contends that the principle to be determined is, whether a ferry license is assignable.

[Omitted.]

The next question is one which presents more difficulty, and relates to the allegation of partnership set up by the respondent in the answer to the first suit, denied by the Hacketts, but found to exist in the court below. The ferry license was originally granted to M. A. Hackett and Norman Finch; subsequently they transferred one-third of each of their interests in the ferry to M. F. Mulkey, and they built the steam ferry boat Albina, and started the ferry. The evidence shows that these parties entered into written articles of copartnership, for the purpose of operating the ferry, in which it was provided that Hackett should be paid a certain sum monthly for his services in operating the boat, in addition to his share in the profits, after deducting expenses and losses as a copartner. It would seem, after the transfer to the respondent, that they carried on the business together in accordance with their partnership agreement. There is nothing to indicate that it was formally adopted; but the management of the business and the conduct of the parties are consistent with that understanding. At least, the ferry was operated by the parties with the understanding that the respondent was to pay two-thirds of the expenses of the business, and receive two-thirds of the profits, and each of the Hacketts was to pay one-sixth of the expenses, and receive one-sixth of the profits; or one-third, in this ratio, belonged to the Hacketts, without reference to any understanding existing in regard to it as between themselves. But certainly, if any partnership existed, as found by the court, it ought to have been dissolved.

It is apprehended however that the court below, in reaching the ultimate result, was less affected by mere technical rules than those general principles of equity adapted to the particular features of the case, and calculated to determine rightfully and justly the relations of the parties and their rights and interests in the premises. As we view it it is immaterial whether the relation of partnership or that of simply co-ownership existed between the parties. The fact of ownership, and the rights of ownership, do not depend upon the

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relation of partnership between the parties. The relation of partnership arises out of contract between the parties, while a joint ownership in property may be created where there is no contractual relations. The objection to a partnership between a corporation and a natural person rests wholly upon the fact that, while in an ordinary partnership the act of one partner binds the other, yet under the laws authorizing the formation of corporations, the latter can only be bound by the acts of its officers, and can only use its funds for the objects prescribed in the articles. "There is no general principle of law," says Mr. Lindley, "which prevents a corporation from being a partner with another corporation or with ordinary individuals, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its Constitution." Lindl. Partn. 86. But the court below may have proceeded upon the hypothesis that this objection would be obviated or at least would not apply when there is a mere community of interests in the profits of the business. There may be a partnership in the profits of a business, although one party is the sole owner of the goods and the other the sole manager of them. The capital may consist in the mere use of the property owned by the individual partners separately. Coll. Partn., § 17, n.

The respondent having assumed the management of the business, and to be the managing owner of the property, and finding that there was nothing inconsistent in this with its charter powers, the court evidently assumed that the relation of community of interest in the earnings of the business was not inconsistent with the purposes for which the company was formed, nor with the exclusive power of the proper officers of the corporation to manage its affairs; and being tenants in common of the ferry property, that they might be partners in the profits of the ferry. This was consistent with the previous dealings and conduct of the parties under the old agreement and since the transfer, and would apply a just and equitable principle to the new agreement and settlement of their business. Assuming however that there was no partnership, it is clear that it was competent for the parties to become co-owners in the ferry (under the circumstances already indicated), and as such to be entitled to share in its earnings; and that upon the exclusion of one by the other, a receiver would be appointed and an accounting had. A receiver will be appointed of a steamboat when the owners dispute. Edw. Rec. 331.

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The obligation of a partner to account with his copartner arises *ex contractu*. The obligation of a co-owner to account with the others for the profits which may have arisen from the common property cannot be based upon contract when no contract has been entered into, but it by no means follows, because there is no contract, express or tacit, to share profits, each co-owner ought to be entitled to get what he can, and to keep what he may get. This, it is said, was plainly enough seen by the Roman lawyers, who properly held an obligation to arise *quasi ex contractu*, and who found no difficulty in declaring that every co-owner ought to account to the others for the profits received by him, and contribute with them to the expenses properly incurred for the common benefit. So that it would seem, whether the relation of partners or co-owners exists, the rights of the parties are the same, at least so far as concerns the common property as such; and a co-owner, equally with a partner, may have an accounting and a receiver appointed.

In *De Witt v. San Francisco*, 2 Cal. 289, the court says: "The books do not afford an instance in which the right to hold as tenants in common, either with themselves or natural persons, is denied to corporations." "A tenancy in common may exist in every species of property, real, personal, or mixed. Two or more persons may, therefore, be tenants in common of a fixture, or of the right to use or convey water in a ditch. * * * So too a franchise may be held by two or more persons as tenants in common." Freem. Co-tenancy, § 88.

In *Haven v. Mehlgarten*, 19 Ill. 91, it was held that "where several persons were authorized to establish and maintain a ferry, such persons were tenants in common of the land, of the franchise granted, and of the vessels and machinery by means of which these franchises, or one of them, is to be exercised and employed, and their contract with the public be performed" (see p. 95); and the court also say: "There is a concurrent jurisdiction in law and equity; and the plaintiff might have resorted to either." (Page 97.) The right of tenants in common to share in the profits of the common property, and resort to a court of equity for an accounting and a receiver in the case of exclusion by one tenant of another, would seem from the necessity of the case and obvious principles of justice to be authorized. "A court of equity has jurisdiction to appoint a receiver, at the instance of one tenant in common, against his co-tenants, who are in the possession of undivided valuable property

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receiving the whole of the rents and profits and excluding their companions from the receipt of any portion thereof, when such tenants are insolvent." Freem. Co-tenancy, § 327, citing *Williams v. Jenkins*, 11 Ga. 598.

All these required facts appear in the case: The value of the property; in what such value consists; the exclusion and the insolvency of the parties in possession. As already stated, the company had the management of the ferry, and such management was acquiesced in and recognized by the joint owners. They accepted employment in the business at the hands of the company, and their compensation was fixed by the company. The gross earnings were turned over by them, in their capacity as employees, to the company. All expenses, including wages of such owners, were paid by the company, and the latter accounted to such owners for their share of the rents and profits. To this status of things thus existing the appellant, notwithstanding he had participated in the original transfer, and those subsequently made, as well as the possession of the respondent, and notwithstanding the large price paid in good faith, and the heavy expense incurred and laid out in improving and rendering the property more valuable and profitable, seems to have conceived the idea that he could appropriate the whole of the property, or that it reverted to him by reason of the invalidity of the transfer of the franchise. * * * From what has been indicated, it follows that there is no necessity for an order of dissolution, as no partnership is found to exist. The court below is also directed to make an order for the receiver to report, and to discharge him if deemed proper under the circumstances of the case. In all other respects the decree must be affirmed.

WALDO, C. J., did not sit in this case.

Decree affirmed.

GUTHRIE V. IMBRIE.

(12 Oreg. 182.)

Negotiable instrument — by agent of corporation — seal.

A promissory note phrased, "we promise," etc., and signed by one, with the addition, "Prest.," and by another with the addition, "Sec. G. M. Co.," and impressed with a seal inscribed, "Granger Market Co., Portland, Oregon, November 4, 1874," is the obligation of the corporation. (*See note. p. 341.*)

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ACTION on promissory note. The opinion states the case. The defendant had judgment below.

Thos. H. Tongue, for appellant.

R. Williams, for respondent.

LORD, J. This action was commenced to recover the amount due on two promissory notes. As both notes are alike in form and purport, the copy of the following will be sufficient for the purposes of this case:

“\$500.

PORTLAND, OREGON, *July 8, 1875.*

“For value received, we promise to pay to David Guthrie or order, ninety days after date, five hundred dollars in U. S. gold coin, without interest.

(Signed)

JAMES IMBRIE, *Prest.*

[SEAL.]

J. J. IMBRIE, *Sec. G. M. Co.*”

On each note is the impression of a seal, containing an inscription, “Granger Market Co., Portland, Oregon, November 4, 1874.” The defendant demurred to the complaint for insufficiency of facts stated, and the demurrer was overruled. The defendant J. J. Imbrie was not served and did not appear. The defendant James Imbrie in his answer pleaded that he executed the notes in question as president of the Granger Market Company, a domestic corporation, for a debt due the plaintiff from it without other consideration, and the plaintiff received the notes as the notes of the Granger Market Company. The reply denied all the material allegations of the answer. Upon issue being thus joined, a trial was had, which resulted in a verdict and judgment for the defendant.

By the record it appears that all the questions we are required to consider, both in respect to the testimony received and that offered and ruled out, as well as the objections to the charge of the court to the jury, and to the special instructions asked and refused, may be resolved into two: First. Are these the individual notes of the defendants or the notes of the Granger Market Company? Second. Are the notes so ambiguous or unintelligible in their language or terms that no rational interpretation can be given of their meaning according to the canons of sound construction, without the aid of extraneous proof? To ascertain the proper interpretation of a written contract, the rule adopted by the courts is to

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give full effect to all the terms in which the contract is expressed. The words used are to be taken in their plain, ordinary, and usual sense, unless their meaning be restricted by usage or the context. The rule assumes that the language employed is inserted in the contract for some purpose, and is intended to have some meaning and effect. This being so, the intention of the parties is to be discovered from the whole contract. The question therefore whether a bill or note has been executed by a party in his individual or official capacity must be determined from the intent as collected from the whole instrument, however inartificially drawn, or informally the intention may be expressed. "If from the nature and terms of the instrument," says Judge Story, "it clearly appears, not only that the party is an agent, but that he means to bind his principal and to act for him, and not to draw, accept, or indorse the bill on his own account, that construction will be adopted, however inartificial may be the language, in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity." Story Ag., § 153.

Again he states the rule thus: "A liberal construction is ordinarily adopted in the exposition of commercial instruments for the purpose of encouraging trade and to meet as far as possible the ordinary exigencies of business, which require promptitude, and rarely admit of deliberate examination of the true force of words. In furtherance of this policy, if it can upon the whole instrument be collected that the true object and intent of it are to bind the principal and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." Story Prom. Notes, § 69.

This rule of construction is clear, easily understood, and designed to promote the ends of justice, but owing to the different forms and modes of expression used in written contracts, there is often found some difficulty in applying its principles. In executing a note or other written instrument, in order to discharge himself from personal liability, the agent must adopt such form of expression, or use such language as will show the writing to be the act of the corporation and intended to bind it. "It seems," says PARKER, J., "to be a general principle that the signer of any contract, if he intends to prevent a resort to himself personally, should express

in the contract the quality in which he acts." *Mayhew v. Prince*, 11 Mass. 54.

Leaving out of consideration the seal upon the note in question, there is nothing in its terms or language which purports to bind the corporation or to be a contract of the corporation. The language is "we promise," etc. The words "prest." and "sec. G. M. Co.," attached to the signatures are merely *descriptio personarum*. They do not disclose the name of any principal, and in fact, are too indefinite, without the aid of extraneous proof, to designate any corporation. When a person merely adds to the signature of his name the word "sec.," "agent," "trustee," without disclosing the principal, he is personally bound. This is undoubtedly the ordinary rule, and supported by much authority. In *Scott v. Baker*, 3 W. Va. 290, the court say: "The president and treasurer, together or separately, may have had authority to make the notes of the company, but in this instance the note is not executed for the company, or in the name of the company, and the addition of president and treasurer to their names cannot have the effect to make it the note of the company." See also *Hays v. Crutcher*, 54 Ind. 261; *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 102; *Sturdevant v. Hull*, 59 Me. 172; s. c., 8 Am. Rep. 409; *Burlingame v. Brewster*, 79 Ill. 516; s. c., 22 Am. Rep. 177; *Tannatt v. Rocky Mountain Bank*, 1 Colo. 279; s. c., 9 Am. Rep. 156; *Towne v. Rice*, 122 Mass. 75; *Chamberlain v. Pacific Wool G. Co.*, 54 Cal. 106; *Cahokia v. Rautenberg*, 88 Ill. 220; *Bank v. Cook*, 38 Ohio St. 444; Ewell's *Evans Agency*, 248, notes; 1 Dan. Neg. Inst., § 403.

But the character in which the signatures were attached to the note in hand, and the intent, as discoverable from that instrument, whether to bind the corporation or the individuals signing it, is relieved of much difficulty when the seal is taken into consideration. On the note is an impression of a seal bearing the words "Granger Market Co." It must be assumed that the seal bearing these words, plainly stamped upon the note, was put there to serve some purpose, and to give some effect to the instrument, and certainly it tends to explain the purport and purpose of the words "prest." and "sec. G. M. Co." attached to the signatures, and to indicate the quality or capacity in which such signers of the note acted. In *Means v. Swormstedt*, 32 Ind. 87, where the secretary of an incorporated company gave a promissory note, using the words "we promise to pay," etc., and signed it with his own name, with

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“sec’y” affixed, and impressed thereon the seal of the corporation bearing the words “Neal Manufacturing Co., Madison, Ind.,” it was held that he was not personally liable thereon. The court say: “The seal of the company is in the hands of the secretary. It is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which containing upon its face the proper designation of the corporation, was a signing of their name.”

And again: “It can be a matter of no import how a name is affixed to a paper, whether written with ink or pencil, printed or stamped. The intent in placing it there must control, and where that intent is evident, effect should be given to it. * * * The note was plainly intended to read as executed by ‘Wm. R. Swormstedt, Sec’y Neal Manufacturing Co., Madison, Ind.,’ and if effect be given to the addition to the name, the corporation must be bound.”

It will be noticed in this case that the plural expression “we promise” is followed by a single signature, which is more consistent with an intent to bind the company, who are many, than the individual. But certainly little importance was attached to this fact by the court, as there is no reference or allusion to it, although it may have received consideration in connection with other and stronger *indicia*, upon which stress was laid and deemed controlling in determining the intent with which the note was executed. It is however this respect in which the note in that case is distinguishable from the one before us. Here the plural expression “we promise” is followed by two signatures, which is as consistent with the intent to bind themselves individually as to bind the company, unless the effect of the seal with its designation of the company excludes the intent to bind personally.

In the particular just noted, more nearly the counterpart of this case under consideration is that of *Dutton v. Marsh*, L. R., 6 Q. B. 361, where a different conclusion was reached as to the effect of merely affixing the seal. There the note was :

“We, the directors of the Isle of Man Slate & Flag Company, Limited, do promise to pay John Dutton, Esq., the sum of £1,600, sterling, with interest at the rate of six per cent until paid, for value received. Richard J. Marsh, *Chairman*, Joseph Higgins, Samuel Brondbert, Henry Johnson.”

[L. S.]

“Witnessed by Leslie Lochort.”

In the corner of the note the company's seal was affixed, with "witnessed by Leslie Lochort." The question was whether the putting of the company's seal on the note was not equivalent to saying "on behalf of the company."

In delivering the judgment of the court, COCKBURN, C. J., said: "But this case was rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note, made on behalf of or on account of the company. So far as the written portion of it goes, it is totally without such qualifying expression, but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms, on the face of the note, that the note was signed by the persons who put their names to it on behalf of the company, and not on behalf of themselves. But on consideration, I agree with my learned brothers this effect cannot be given to placing this seal of the company upon the note. It may be that it was simply for the purpose of ear-marking the transaction, or in fact showing as to the directors, that as between them and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes to the extent of saying that the affixing of the seal, when the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect."

It does not appear from this case that the corporate seal was attached with an impression of the name of the company, as in *Means v. Swormstedt*, *supra*, or as in the case before us. There was a seal affixed, but whether it contained a designation of the company or some other device is not disclosed. If the seal did bear an impression of the name of the company, the case is only distinguishable from *Means v. Swormstedt*, *supra*, in the particular already noted to the case under consideration. But we apprehend the seal did not bear an inscription of the name of the company; and if this view is correct, mere affixing of the seal to the note in that case was not a signing of the company's name, within the reason of *Means v. Swormstedt*, but as was said, simply for the purpose of ear-marking the transaction; and therefore was not the use of such terms by the parties as would

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have the effect to exclude their personal liability. But in our judgment, the note before us does fall within the reason and principle decided in *Means v. Swormstedt*. It was signed by "James Imbrie, Prest.," and "J. J. Imbrie, Sec. G. M. Co.," and the seal is affixed to it bearing in plain characters the inscription "Granger Market Co." The rule of construction requires us to give effect to every word, if possible, and if any effect or significance is to be given to the name of the company, plainly stamped upon the paper or note, we know that the words "prest." and "sec. G. M. Co." attached to this signature, instead of being mere surplusage or useless appendages are susceptible of being made operative consistently with the terms of the whole instrument, and mean that these persons are such officers of that company, and are intended to indicate the official character in which they acted when the note was executed. We know that these words were intended to serve some purpose; and what other purpose can they serve, taking into account the corporate name, which is consistent with the terms of the promise, but to indicate their official character, and that they acted on behalf of the company, and not on their individual behalf? We know that it is the duty of the proper officer, generally the secretary, to affix the seal to the papers executed by the corporation, and when, after signing his name and adding his office, he affixes the seal of the corporation, which, as the court say in *Means v. Swormstedt, supra*, "containing upon its face the proper designation of the corporation, was a signing of the company name."

In *Scanlan v. Keith*, 102 Ill. 640; s. c., 40 Am. Rep. 624, where the note sued upon was, "ninety days after date we promise to pay to the order of John Scanlan," etc., and was signed underneath at the right hand "Sam'l L. Keith, Prest. Chicago Ready Roofing Co.," and at the left hand, at the usual place for the signature of an attesting witness, was signed "W. H. Kretzinger, Sec'y," with the seal of the "Chicago Ready Roofing Company" attached, it was held to be the note of the company. In delivering the opinion of the court, Scott, J., said: "It is inconceivable a person familiar with the business transacted by a corporation, taking a note executed by its officers under its corporate seal, should believe he was obtaining the individual note of the officers whose names are attached to it. It needs no extrinsic evidence to show that such a note is the obligation of the corporation. Such is the common

understanding, from what appears upon the face of the instrument itself. A most unreasonable conclusion it would be to hold that a secretary of a corporation, who attests such an instrument by his signature and the corporate seal, thereby becomes a joint maker. This is precisely the case here. Kretzinger was secretary of the corporation, for aught that appears in his record he did nothing more than attest the execution of the note and affix the seal of the corporation. Should that act by judicial construction be held to constitute him a joint maker of the instrument to which his name is attached, it would be to make a note for him, which the party himself certainly never had the remotest intention of doing. The same reasoning applies with equal force to the defendant, who made the note as president of the corporation, in connection with the secretary, using the seal of the corporation."

It may often happen in the haste incident to the prompt execution of business, or through inadvertence, being more intent on the substance than the form, that merchants or others engaged in business transactions express themselves in their writings informally, and without precision of language, and hence the liberal policy of allowing the intent of the parties to govern, as discoverable from the whole instrument. But we do not think it is usual for persons engaged in business transactions, when acting for themselves and not in a representative capacity, to attach to their signatures such designations of office, and to attest the same with the seal of the corporation bearing an impression of its corporate name. On the contrary, we believe when such things are done, and the instrument is consistent and operative with such *indicia*, they are more properly referable to the company than the persons as individuals who signed the instrument.

We think these notes in question were executed on behalf of the corporation, and not personally, and were the notes of the company. It seems, however, that the court below, in overruling the demurrer, expressed the opinion that the notes were the notes of the defendant, and not of the corporation; but evidently, from the testimony received and objected to, and the instructions given and refused, as disclosed by the bill of exceptions, the court considered the notes ambiguous on their face, and evidence necessary to fix their true character. No other view is consistent with the course pursued by the court; for if the notes are not uncertain on their face, as we think, there exists no necessity for resorting to parol proof. The

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case has been tried on this basis, and the question of admissibility of such evidence been presented and discussed to us. But it is not necessary for us to go into much examination of this subject, or review the decisions upon it. It is sufficient for us to state that our impression is, as between the original parties, when the instrument is ambiguous or uncertain upon its face, and the matter is in doubt whether the principal or agent is liable, such uncertainty may be removed by extraneous proof. *Haile v. Pierce*, 32 Md. 331; s. o., 3 Am. Rep. 139; *Klosterman v. Loos*, 58 Mo. 292; *Hood v. Hallenbeck*, 7 Hun, 367; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Metcalf v. Williams*, 104 U. S. 97; 1 Dan. Neg. Inst., § 418; 2 Whart. Ev. 1058-1061.

The bill of exceptions discloses that the persons signing the notes as "prest." and "sec. G. M. Co." were such officers of the corporation, and authorized to execute the notes; that they executed and signed the notes as such officers, and the secretary affixed the seal, for and on behalf of the corporation; and that the consideration for the notes was cattle purchased by the company, and were given by the company, and received as such in payment of the same. Upon the theory that it was doubtful from the face of the notes whether they were intended to operate as a personal or corporate engagement, we do not discover any error. I think therefore the judgment should be affirmed.

Judgment affirmed.

WALDO, C. J., dissenting. The case of *Dutton v. Marsh*, L. R., 6 Q. B. 361, can hardly be distinguished from the present. The court in that case argued that assuming the seal not to be affixed, the note was clearly the note of the individual signers. If then it became the note of the company by reason of the seal being affixed, affixing the seal must be the equivalent of a declaration that the directors signed the note on account of or on behalf of the company. And they say, "we think it is going too far to say that the mere affixing the seal has that effect." So in this case, assuming the seal not to be affixed, the note is the note of the defendants, and consequently, as in *Dutton v. Marsh*, affixing the seal cannot be construed into a declaration that they signed on account of or on behalf of the company. If the seal shall have the effect to make the company a party at all, there are grounds for saying that it shall make it a several obligor. Dan. Neg. Inst., § 34, citing

Rankin v. Roler, 8 Gratt. 63. A note under seal is a specialty, and not a negotiable promissory note. *Clark v. Farmers' Co.*, 15 Wend. 256; *Hopkins v. Railroad Co.*, 3 Watts & S 310; *Conine v. Junction & B. R. Co.*, 3 Houst. 288. But in this case a function seems to be claimed for the seal hitherto unknown to the law. "The sole purpose of the seal is to give full faith and credit to the writing to which it is appended." *U. S. Bank v. Dandridge*, 12 Wheat. 93; Holmes Com. Law, 272.

It is not claimed in this case that the seal authenticates the note, and thereby puts it under seal. But if it does not do this, it performs no function appertaining to the office of a seal. The law declares the function and effect of a seal, and the court cannot say that it shall perform some other office. It can make no difference what the impression may be, because the seal does not prove itself, and the effect of any impression, when proved to be an impression of the corporate seal, must be precisely the same in all cases. It is necessary then, and the endeavor is, to construe the act of affixing the seal not as an act of authentication, but as a declaration in parol. To do this the seal as a seal must be discarded, and extrinsic evidence admitted to show the intention. The words "The Granger Market Co." were but a part of the impression of the seal of the Granger Market Company, and as such go to make up the identity of its seal, and nothing more, as any device substituted for them would have done. If the intention were not to impress the seal, but these words alone on the paper, that intent is a fact to be proved to contradict the presumption of law created by the act of impressing the seal. The moment this is attempted we come in conflict with the rule that "the liability of the defendants as drawers of a negotiable instrument must be determined from the instrument itself." *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 104. "He who takes negotiable paper contracts with him who on its face is a party thereto, and with no other person." Met. Cont. 108. "It is not a universal rule," says Lord ELLENBOROUGH, *Lead-bitter v. Farrow*, 5 Maule & S. 349, "that a man who puts his name to a bill of exchange makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he plainly says 'I am the mere scribe,' he becomes liable." "Not quite a universal rule," say the Supreme Court of the United States; but the rule remains.

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It is well settled that whether a principal or his agent is the party liable upon a promissory note or bill of exchange, must be ascertained from the instrument itself. All evidence *dehors* the instrument is to be excluded. *Barlow v. Congregational Soc.*, 8 Allen, 460; *Brown v. Parker*, 7 Allen, 337; *Slawson v. Loring*, 5 Allen, 342; *Rendell v. Harriman*, 75 Me. 497; s. c., 46 Am. Rep. 421. "If it is left ambiguous on the face of the instrument whether they have so signed it, the construction most against the person signing should prevail." CROMPTON, J., in *Deslandes v. Gregory*, 2 El. & El. 609. In many of the States there seems to be too slender a union between principle and practice. The result is that uncertainty and confusion which usually follows departure from principle.

In *Means v. Swormstedt*, the seal as viewed by the court showed that William M. Swormstedt was secretary of the Neal Manufacturing Company. "The note was plainly intended to read as executed by Wm. M. Swormstedt, Sec'y Neal Manuf. Co., Madison, Ind.;" and this it seems was thought sufficient to create a corporate obligation. The authorities are certainly nearly all the other way. It should seem that if the seal cannot have effect as a seal, it cannot have any operation at all, the exclusion of extrinsic evidence leaving it where it was left in *Dutton v. Marsh*. It follows that the defendants ought to be held liable.

NOTE BY THE REPORTER — The case of *Watriss v. First Nat. Bk. of Cambridge*, 124 Mass. 571; s. c., 26 Am. Rep. 694, cited in the principal case, was followed in *McIver v. Estabrook*, 184 Mass. 550, and the same case, and *Loughran v. Ross*, 45 N. Y. 792; s. c., 6 Am. Rep. 178, were followed in *Marks v. Ryan*, 68 Cal. 197. But in *Kerr v. Kingsbury*, 89 Mich. 150; s. c., 88 Am. Rep. 862, this doctrine is denied. The latter case is not cited by Wood in his *Landlord and Tenant*, nor in the last edition of Taylor.

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(19 Oreg. 231.)

Injunction — against trespass.

The defendant repeatedly tore down a fence or gate and drove over the plaintiff's lands, claiming that the place was a public highway by dedication and use. *Held*, that an injunction should not issue. (*See note, p. 846.*)

ACTION for injunction. The opinion states the case. The plaintiff had judgment below.

Charles Gardner, and P. L. Willis, for appellants.

H. Y. Thompson, for respondent.

LORD, J. This is a suit in equity for an injunction to restrain the defendants from trespassing upon the lands of the plaintiff. In substance it is alleged that the plaintiff is the owner of the lands described in the complaint, and that the defendants are the owners of a tract of land lying north of and adjacent to said lands; that the plaintiff's lands are meadow lands, and that the defendants have been guilty of a series of trespasses upon plaintiff's said lands, such as driving over his meadows, destroying his grass, cutting up his soil with wagons, and breaking and destroying his fences; and that the defendants threaten to continue the trespasses complained of, to the irreparable damage of the plaintiff. The answer denies nearly all the allegations of the complaint, and then, in a further answer, justifies the acts complained of, on the ground that there is a public highway across the plaintiff's lands at the place where said acts were committed; and that the defendants have done nothing more than travel said highway and remove obstructions therefrom; and that such public highway was established by use for a period long enough to create such an easement. The reply puts in issue the uses and existence of the highway.

The manifest object of this suit is to determine whether a highway exists across the lands of the plaintiff. Analyzed, the complaint is nothing more nor less than an action of trespass *quare clausum fregit*, to which the defendants plead in effect, (1) not guilty; (2) justification, that the fence or gates which they removed

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were obstructions to a public highway which they had a right to remove. The replication denied that it was a public highway, and that was the issue to be tried. Indeed it was said at the argument and in the briefs that the only question in the case was whether or not there is a highway across the plaintiff's land. The mode by which it is sought to determine this question is not in the ordinary course of law, and ought not to be tolerated unless justified by particular facts which authorize the jurisdiction of equity. The practice of granting injunctions in cases of trespass is of comparatively modern origin, and is a jurisdiction sparingly indulged, and only upon a state of facts which show the injury would be irreparable and the remedy at law inadequate to redress the wrong or injury complained of. When the nature of the trespass is such as must necessarily lead to oppressive litigation or a multiplicity of suits, or the injury goes to the destruction of the estate in the character in which it is enjoyed, or the trespass cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, a court of equity in such, or like cases, is authorized to interfere and grant relief by injunction. But the general doctrine, well established by the authorities, is that a court of equity will not grant an injunction to restrain a mere trespass where the injury complained of is not irreparable and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation, and for which he may obtain adequate satisfaction in the ordinary course of law. High Inj., §§ 697, 703; 3 Wait Act. and Def., tit. "Trespass," and authorities cited; Pom. Eq. Jur., § 1357, n.

"Equity," said PEARSON, J., "does not extend its jurisdiction either to offenses against the public or to civil trespasses. In reference to the former no exception has ever been made; but in reference to the latter an exception has been allowed after much hesitation and jurisdiction assumed for the prevention of torts or injuries to property by means of the writ of injunction under certain restrictions, namely: Two conditions must concur in order to give jurisdiction, the plaintiff's title must be admitted or be established by a legal adjudication, and the threatened injury must be of such a nature as will cause irreparable damage." *Gause v. Perkins*, 3 Jones Eq. 178. See also *Bolster v. Catterlin*, 10 Ind. 118; *Jerome v. Ross*, 7 Johns. Ch. 334; *Cooper v. Hamilton*, 8 Blackf. 378; *Millan v. Ferrell*, 7 W. Va. 229; *Smith v. Pettingill*, 15 Vt. 84.

Now, what is the injury of which the plaintiff complains? Sim-

ply that the defendants have torn down his fence or gate and driven their team across his meadow, whereby the grass has been trampled down and destroyed. It will hardly be contended that the destruction of the fence or gate is not susceptible of pecuniary compensation, and for which the law does not afford a prompt, adequate and complete remedy. It is true that grass trampled down and destroyed cannot be made to grow again, but the injury can be adequately atoned for in money. Therefore the plaintiff can recover for the trespass compensation equivalent or adequate to the injury which he has sustained, such injury, in no sense of the word, can be considered irreparable. All the cases fix the rule to be that the injury must be of that peculiar nature that it cannot be adequately compensated in damages or atoned for in money. There must be some equitable feature or incident to take it out of this rule, or equity will not interfere; as where the injury, although susceptible of pecuniary compensation, yet in the particular case, if the party is insolvent, and on that account unable to atone for it, it will be considered irreparable. But where the facts present no matter requiring equitable relief, and the remedy at law is adequate to do full and complete justice, the court itself should reject such jurisdiction as not within its legitimate province. To hold otherwise would confound all principles upon which the equitable jurisdiction stands. It will only be necessary to cite a few out of many cases to show that the remedy at law is not only adequate, but the one invariably pursued in cases of this character. *Cyr v. Madore*, 73 Me. 53; *Wright v. Tukey*, 3 Cush. 290; *Burnham v. McQuesten*, 48 N. H. 446; *Marcy v. Taylor*, 19 Ill. 634; *Morse v. Ranno*, 32 Vt. 600; *Sharp v. Mynatt*, 1 Lea, 375; *Barraclough v. Johnson*, 8 Ad. & E. 99; *Le Neve v. Mile End Old Town*, 8 El. & B. 1055.

There is another consideration to which it may not be amiss to refer. Upon the admitted facts, the record discloses that the alleged road never was, in one sense, an open and unobstructed highway. It has always had gates or bars across it, through which those traveling over it had to pass. The claim that it is a public road is based upon user and dedication. It is admitted that it has never been worked, repaired, or accepted by the proper authorities of the county. That the owner of the soil may make a qualified dedication of a road or way is established by judicial authority. He may reserve the right to keep a gate across it, or to subject it to any uses by himself or others not inconsistent with the public use, and if the

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public accept it, it takes it subject to these uses. Wood Nuis., §§ 242, 243, and note of authorities; *Davies v. Stephens*, 7 Car. & P. 571. But the doctrine that a right of way or public road, with gates or bars across it, may be shown by dedication, is cautiously admitted and applied. In the case of *Worth v. Dawson*, 1 Sneed, 62, where the road had been used by the neighbors as a church and mill road for nearly thirty years, the court say: "No use or acceptance of the way by the public is shown, nor any recognition of it by the proper authority, the County Court. That a right of way may be claimed by dedication to the public use by the owner of the soil is not denied; but with us this doctrine must be cautiously admitted. Its too easy application would defeat the right of the owner of the soil to have compensation for damages sustained by laying out a road over his land, to which he is entitled when such road is laid out by the proper authority."

In *Johnson v. State*, 6 Cold. 535, the principle is cited with approval from Angell on Highways that mere user, however uninterrupted by the public, and long continued, is not sufficient to give the right in the public; but that such user must be accompanied by acts showing the user to have been under a claim of right, and not merely by permission of the land-owner; such as working the road, keeping it up by the public, repairing it, or removing obstructions, etc. "A permissive use of a way by certain portions of the community constitutes a license and not a dedication, and is ordinarily something that may be revoked." "Everything, in such cases," said BARROWS, J., "depends upon the intention of the party whose dedication is claimed, and upon the character of the permission given and the use allowed." *White v. Bralley*, 66 Me. 259; citing *Stafford v. Coyney*, 7 Barn. & C. 257, and *Barraclough v. Johnson*, 8 Ad. & E. 99.

In *Hall v. McLeod*, 2 Metc. (Ky.) 101, SIMPSON, C. J., said: "It cannot be admitted that where the proprietor of land has a pass-way through it for his own use, the mere permissive use of it by other persons for half a century would confer upon them any right to its enjoyment. So long as its use is merely permissive, it confers no right; but the proprietor can prohibit its use or discontinue it altogether at his pleasure. A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man, by allowing his neighbors to pass through his farm without objection over the pass-

way, which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the pass-way to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue."

See also *Kilburn v. Adams*, 7 Metc. 33; *State v. Nudd*, 23 N. H. 335; *Morse v. Ranno*, 32 Vt. 600; *Jones v. Davis*, 35 Wis. 382; *State v. Harden*, 11 S. C. 366; *Burnham v. McQuesten*, 48 N. H. 451; *Sharp v. Mynatt*, 1 Lea, 376; *Wright v. Tukey*, 3 Cush. 290.

Without intending in the slightest degree to express any opinion upon the merits, the real controversy in this case turns upon the question whether or not there is a public road where the alleged acts of trespass were committed. Upon this point, although there is not so much controversy about the facts in evidence, the inferences sought to be drawn from them by the parties are wholly irreconcilable and antagonistic. Upon the one hand, it is contended that the evidence establishes that the plaintiff intended to dedicate it to the public as a highway. On the other hand, it is contended that the plaintiff, and those who preceded him in the fee, did not intend it as a dedication to the public, but as a private way for his own convenience, and that the use of it by the public was only permissive, and constituted a license, which was revocable at his pleasure. Here then are questions of fact to be investigated, which a jury, under the guidance of a court of law, are peculiarly fitted to determine, and which the authorities cited show that the remedy at law is not only appropriate, but competent, to render a judgment which shall establish the right or estate, and do complete justice to the matter in controversy. In *Hacker v. Barton*, 84 Ill. 314, the court holds, following *Wing v. Sherrer*, 77 Ill. 200, that "as a general rule, it is better in all cases of a doubtful character, presenting a conflict of evidence, parties should be remitted to whatever remedy they may have at law, although equity might entertain jurisdiction," and that this was especially so when there was a conflict of evidence in regard to the alleged fact of dedication of land to public uses. But here the case is without any equitable facts or circumstances upon which such jurisdiction can be based or assumed. The remedy is at law, and must be pursued there.

The decree is reversed, and the bill dismissed.

Decree reversed.

NOTE BY THE REPORTER.—High on Injunctions, § 697, says of injunction against trespass as distinguished from waste: "The foundation of the

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jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits; and where facts are not shown to bring the facts within these conditions, the relief will be refused. Equity will not therefore enjoin a mere trespass to realty as such, in the absence of any element of irreparable injury. But where, owing to the peculiar character of the property in question, the trespass complained of cannot be adequately compensated in damages, and the remedy at law is plainly inadequate, equity may properly interfere by injunction."

As a general rule the plaintiff must show good title. *High Inj.*, § 698; *Hart v. Mayor, etc.*, 9 Wend. 572; s. c., 24 Am. Dec. 165.

In *Oresap v. Kemble*, 26 W. Va. 603, the court said: "Both bills were filed to enjoin trespasses to real property and settle the title thereto without any charge of insolvency against the defendants in either bill, and without the allegation in either of any facts from which the court could see, that unless the defendants were enjoined, irreparable damage would result. It is well settled that a court of equity has no jurisdiction to settle the title and boundaries of land where the plaintiff has no equity against the party who is holding the land. *Lange v. Jones*, 5 Leigh, 192; *Hill v. Proctor*, 10 W. Va. 59. An injunction is not granted to restrain a mere trespass to real property when the bill does not clearly aver good title in the plaintiff, nor then as a general rule, where the injury complained of is not destructive of the substance of the inheritance, of that which gives it chief value, or is not irreparable but is susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the law courts. *McMillan v. Ferrell*, 7 W. Va. 228; *Cox v. Douglass*, 20 W. Va. 175; *Schoonover v. Bright*, 24 W. Va. 698.

"To warrant the interference of a court of equity to restrain a trespass upon real property, two conditions must co-exist: First, the plaintiff's title must be undisputed or established by legal adjudication; and second, the injury complained of must be irreparable in its nature, unless there are other equitable grounds for interference. It is not sufficient in such case, that the bill contains mere general averments of irreparable injury, but the facts constituting such injury must be set forth. *Schoonover v. Bright*, 24 W. Va. 698."

The injunction may arise where the complainant is under a legal disability to enforce his legal remedy. *Smith v. Smith*, 4 Jones Eq. 303.

Multiplicity of suits implies different persons assailing the same right, and not merely a repetition of trespass by the same person. *Hatcher v. Hampton*, 7 Ga. 50.

Prominent and common examples of what is considered irreparable injury are destruction of fences, fruit and ornamental trees, *Wilson v. City of Mineral Point*, 39 Wis. 160; *Powell v. Cheshire*, 70 Ga. 356; s. c., 48 Am. Rep. 572; injury to support of soil; *Troubridge v. True*, 52 Conn. 190; s. c., 52 Am. Rep. 579, and note, 581, to mines and quarries, *Anderson v. Harvey*, 10 Gratt. 386; *More v. Massini*, 32 Cal. 590; *Scully v. Rose*, 61 Md. 408; *Chambers v. Ala. Iron Co.*, 67 Ala. 353; *Derry v. Ross*, 5 Col. 295; *Norton v. Snyder*, 4 Thomp. & C. 330; cutting timber when it amounts to waste, *Fulton v. Harman*, 44 Md. 251; *Piper v. Piper*, 38 N. J. Eq. 81; *Thatcher v. Humble*, 67 Ind. 444; removal of oysters from oyster bed, *Boedicker v. East*, 24 La. Ann. 154; tear-

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ing down buildings, *Marion v. Johnson*, 22 La. Ann. 512; or a sea wall, *Chalk v. Wyatt*, 8 Minn. 688; interfering with burial grounds, *Mooney v. Cooledge*, 30 Ark. 640; destruction of church property, *Trustees v. Hoessli*, 18 Wis. 348; interference with highways, *Town of Burlington v. Schwartman*, 52 Conn. 181; s. c., 52 Am. Rep. 571, and note, 574; *Pratt v. Lewis*, 39 Mich. 7; but see *Sargent v. George*, 56 Vt. 627; overflowing lands by a dam, *Switzer v. McCulloch*, 76 Va. 777.

In *Wilson v. City of Mineral Point*, 39 Wis. 160, the court said: "It is sufficiently averred in the complaint that the defendant Weidenfeller, acting under the authority and orders of the regularly constituted authorities of the defendant city, is about to destroy fences, fruit and ornamental trees and shrubbery standing and growing upon premises owned by the plaintiff and occupied by him as his residence and homestead; that the pretense for so doing is that such fences, trees and shrubbery are within the limits of public streets; but that such pretense is unfounded in fact, and the defendants have no lawful authority to do the threatened acts.

"On the facts averred it is clear that the plaintiff is entitled to an injunction as prayed in the complaint. It is quite true that the courts will not interfere by injunction to restrain the committing of a mere trespass, for which, if committed, the recovery of damages in an action at law would be an adequate remedy. It is also true that the courts will interfere by injunction and prevent a threatened injury, which if inflicted will be irreparable.

"An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard. High Inj., § 460, and cases cited. It is said by Judge Story that 'if the trespass be fugitive and temporary, and adequate compensation can be obtained in action at law, there is no ground to justify the interposition of courts of equity. Formerly indeed all courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future.' 2 Eq. Jur., § 928.

"That the threatened injuries which this action was brought to prevent, would, if inflicted, be irreparable in the legal acceptation of that term, and would greatly impair the just enjoyment of the plaintiff's property, is perfectly well settled. No one will seriously contend that a money compensation is an adequate remedy for the loss of the trees and shrubbery which the complaint avers the defendants threaten to destroy; and it would be a denial of justice were the courts to refuse the plaintiff the protection he asks, and thus permit his home to be permanently despoiled. See High Inj., § 467, and cases cited."

In *Poirier v. Fetter*, 20 Kans. 47, it was held that an injunction will lie at the instance of a land-owner to restrain a public officer from tearing down fences, and attempting to open a highway through the plaintiff's premises, where no legal highway has been established; and the solvency of such officer is no defense to the action. The court said: "It is objected that the wrong is

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a mere trespass, that the trespasser is not alleged to be insolvent, and that a general allegation that the threatened damages are irreparable is insufficient, and that it must be shown in what respect they will be irreparable. We see no error in the ruling of the District Court. A mere trespass will not be restrained; *Gulf R. Co. v. Wheaton*, 7 Kans. 282; but where the trespass, if permitted to continue, will ripen into an easement, there injunction will lie; *Kirkendall v. Hunt*, 4 Kans. 521. As is said in Willard's Equity Juris. 881, 'while for a mere naked trespass, when the remedy at law is full and adequate, equity will not interpose, yet for the purpose of quieting a possession, or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened in relation either to mines, quarries, or woodlands, the court will interfere by injunction, even against a person acting under a claim of right.'

"Here the act sought to be enjoined is not a mere naked trespass. It disturbs the plaintiff's possession, and will, if permitted to continue, ripen into an easement. User will establish a highway, and the officer is attempting to create the user. The law will protect a land-owner in his possession against any unauthorized interference therewith. See as cases in point, among a multitude, *McArthur v. Kelley*, 5 Ohio, 189; *Morehead v. L. M. R. Co.*, 17 Ohio, 840; *Anderson v. Comm'rs Hamilton Co.*, 12 Ohio St. 642; *Bohlman v. G. B. & C. R. Co.*, 30 Wis. 105; *Didrichs v. N. & C. R. Co.*, 33 Wis. 219; *Weigel v. Walsh*, 45 Mo. 560; *Carpenter v. Grisham*, 59 Mo. 247. The threatened loss of his land is the irreparable injury, and it matters not how solvent he may be who seeks to take it or to transfer it to the public use, the courts will protect the possession of the owner." To the same effect, *Mason City Salt Co. v. Mason*, 23 W. Va. 211; *Erwin v. Fulk*, 94 Ind. 235.

In *Long v. Kasebeer*, 28 Kans. 238, the court said: "It is further urged that the petition makes a case of simple naked trespass and does not authorize a temporary or final order of injunction, or any other equitable relief. The petition will not bear this construction. It alleges that the plaintiff is now, and has been for years, the owner and in the actual possession of the premises; that the same are partially inclosed, and about fifty acres thereof broken and in cultivation; and then sets forth that proceeding under some pretended claim of right, the defendant is seeking to oust plaintiff from the possession of the premises, and appropriate the same to his own use and occupation. It further alleges that the defendant is irresponsible, and not able to respond in damages for the injuries and damages apprehended. So long as the plaintiff is in the actual possession of the premises, the defendant has no right by force to attempt to enter thereon to oust him of such possession, or to deprive him of the use thereof, or to erect any buildings thereon. It is said that the fact that the injury is irreparable may arise either from the nature of the injury, or the want of responsibility of the person committing it, and that either will furnish sufficient grounds for interference by injunction. To exclude equitable relief, it must not only appear that there is some remedy at law, but also that it is adequate. If the defendant is irresponsible, the actions at law proposed by his counsel can scarcely be said to be adequate.

"Again, the defendant has no right to erect and maintain a building on land

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owned and in the actual possession of plaintiff, and the erection of such building is a trespass of a character to authorize equitable relief. *Grant v. Crow*, 47 Iowa, 632; *Sword v. Allen*, 25 Kans. 67; *Webster v. Cooke*, 23 Kans. 637; Code, § 238.

"In *McPike v. West*, 71 Mo. 199, it was held that a petition which shows that defendants are about to open a road through plaintiff's premises, and for that purpose are about to cut plaintiff's timber and hedges and remove his fences, thereby exposing his crops and fruit trees, and his meadow and pasture lands to the depredations of stock, states a good cause for injunction. It is not necessary to aver and prove in addition that the defendants are insolvent. Such injuries would be irreparable in a legal sense."

On the other hand, injunction will not issue to restrain the erection of a fence, *Herr v. Bierbower*, 8 Md. Ch. 456; nor the removal of one, *Minnig's Appeal*, 82 Penn. St. 378; nor the throwing of mud and earth on the complainant's land, *Mulvany v. Kennedy*, 26 Penn. St. 44; landing of passengers at plaintiff's dock, *New York P. & D. Establishment v. Fitch*, 1 Paige, 97; an encroachment of six inches on a highway, *Hall v. Road*, 40 Mich. 46; s. c., 29 Am. Rep. 528; nor the occasional moving of a house upon and along the line of a street railway, *Fort Clark Horse Ry. Co. v. Anderson*, 108 Ill. 64; s. c., 48 Am. Rep. 545; nor the extension of a public street over a wharf, *Ballantine v. Harrison*, 87 N. J. Eq. 560; s. c., 45 Am. Rep. 667.

In *Thorn v. Sweeney*, 12 Nev. 251, the trespass complained of was the construction of a ditch across the rocky, barren and uncultivated land of plaintiff. The court said: "This is not an irreparable injury. *Waldron v. Marsh*, 5 Cal. 119. If any injury is done to the land by the construction of the ditch, the defendants are solvent and able to respond in damages, and the plaintiff has a plain and adequate remedy at law.

"This brings us to a consideration of the real question at issue, whether the plaintiff is entitled to the injunction as a matter of right, notwithstanding the fact that the injury will be slight and the damages trivial, because the defendants threaten to continue their illegal acts. It is well settled, that where the title is undisputed, or has been settled by an action at law, and the plaintiff is liable to be irreparably injured by the continued acts of trespass, an injunction should issue. This rule, very properly, prevails in all cases where, as in *Daubenspeck v. Grear*, the plaintiff is threatened with injuries which would, if committed, result in the destruction of his property.

"In such a case 'the fact that the defendants are willing to pay for the property is immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiffs for its destruction.' 18 Cal. 443. But whilst this rule is universal it does not by any means follow that the same rule prevails as a matter of course, simply because the title is undisputed, where no appreciable injury will be done by the acts that are threatened to be continued. This fact is clearly pointed out in the opinion of the chancellor in *Jerome v. Ross*, a leading case upon this subject. 'I do not know a case,' says the chancellor, 'in which an injunction has been granted to restrain a trespasser, merely because he was a trespasser, without showing that the property itself was of peculiar value and could not well admit of due recom-

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pense, and would be destroyed by repeated acts of trespass. In ordinary cases the damages to be assessed by a jury will be adequate for a check and for a recompense.

“ ‘ Every man is undoubtedly entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. He may have on his land a large mound of useless stone or sand, which he may not deem worth the expense of inclosing, and yet it would be a trespass for any person to remove any portion of the stone or sand without his consent; and he would be entitled to his action, even though the damages were nominal. But would it be proper for this court to assume cognizance of such a trespass and lay the interdict of an injunction upon it? I apprehend not.’ 7 Johns. Ch. 884. In answering the objections as to a multiplicity of suits, the learned chancellor, in the same case, says: ‘ A court of equity will sometimes interfere to prevent a multiplicity of suits, by a bill of peace. * * * But that is only in cases where the right is controverted by numerous persons, each standing on his own pretensions, and it has no application to the case of one or more persons choosing to persevere in acts of trespass, in despite of suits and recoveries against them. A troublesome man may vex and harass his neighbor, by throwing down his fences and turning cattle upon his grounds, or by passing over them, or otherwise annoying him; but it is to be presumed that repeated recoveries for damages, with the punishment of costs, and such smart money as a jury would naturally give, would soon effectually correct any such disposition. At any rate, I do not know that a court of equity has ever interfered merely to correct such a practice, and it would certainly require very strong evidence of the inefficacy of the ordinary legal remedies for compensation, as well as for correction, before this court would venture to assume a jurisdiction hitherto unknown.’ Page 887. Equally clear and positive is the language of the vice-chancellor in *Wood v. Sutcliffe*: ‘ Whenever a court of equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights or interests of other persons, which may be more or less involved; it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one) of granting an injunction. * * * I cannot assent to the proposition, that on the mere dry fact of the plaintiff’s having the abstract right, a court of equity will, as a matter of course, on that right being established at law, grant an injunction if the right be infringed ever so minutely.’ 42 Eng. Ch. 165.

“ ‘ The rule applicable to the facts of the case under consideration is very fully and correctly stated in a carefully considered opinion, in *Bassett v. Salisbury Manufacturing Co.*, where the question was presented to the court whether a judgment in a suit at law establishing the plaintiff’s title justified the issuance of an injunction where the trespasses complained of, though slight and trivial, were threatened to be continued. The court say: ‘ The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by arbitrary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily it will not be exercised when the right of the com-

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plainant is doubtful and has not been settled at law, and even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. What injuries shall be regarded as irreparable at law must depend upon the circumstances of the particular case. If the injury be trivial, as by * * * raising the water of a river a few inches upon his rocky shore, doing him no appreciable or serious damage, equity would not ordinarily interfere by injunction; even in cases where the right had been established at law, for the power is extraordinary in its character, and is to be exercised in general only in cases of necessity, and when the court can see that other remedies are inadequate to do justice between the parties, and even then it is to be exercised with great care and discretion. If the granting of an injunction would necessarily cause great loss to the defendant, a loss altogether disproportioned to the injury sustained by the plaintiff, that fact should be considered in determining whether the application should be granted, and in some cases it would justly have great weight. It has often been supposed that when the right has been established at law, the plaintiff would be entitled to an injunction as matter of course, and this misapprehension has arisen probably from the fact that in a large number of cases injunctions have been refused upon the express ground that the title of the plaintiff had not been established at law, leaving room for the inference that if it had been so established the injunction would have been issued. This however is clearly not the doctrine of courts of equity, for they will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law.' 47 N. H. 487.

"The doctrine announced in this case is fully supported by the following authorities: *Bigelow v. Hartford Br. Co.*, 14 Conn. 565; *Wason v. Sanborn*, 45 N. H. 170; *Blake v. City of Brooklyn*, 26 Barb. 301; *Murray v. Knapp*, 42 How. Pr. 462; *Murray v. Knapp*, 62 Barb. 566; *Nicodemus v. Nicodemus*, 41 Md. 537; *Weigel v. Walsh*, 45 Mo. 580; *Herbert v. Carlake*, 11 N. J. Eq. 241; *Catching v. Terrell*, 10 Ga. 578; *Wooding v. Malone*, 30 Ga. 980; High Inj., §§ 459, 483; Eden Inj. 231; 2 Story Eq. 925, 928."

In *Minnig's Appeal*, 82 Penn. St. 373, the trespass threatened was the tearing down and removal of a division fence. The court said: "A court of equity may interpose in a case of trespass to prevent irreparable mischief, and to prevent multiplicity of suits; but if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of a court of equity. Bright. Eq., § 295. As a general rule, mischief which is susceptible of compensation in damages is not irreparable. *Brown's Appeal*, 62 Penn. St. 17. No decree should be made to be followed by injunction, unless irreparable injury be clearly established. *Clark's Appeal*, 62 Penn. St. 447. Hence when the owner of a hotel filed a bill to restrain the removal from it of a cooking-range set in brick work, a hot-water reservoir connected by cast-iron pipes running through the brick-work to the range, a carving-table nailed to the floor, and other fixtures

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of a permanent character for a hotel, it was held the bill would not lie, as they were articles of convenience only, and not of necessity, and there was an adequate remedy at law, therefore a court of equity had no jurisdiction. *Clark's Appeal, supra.* It is there further said it was never intended to take away the common-law right of trial by jury, where a wrong done by a party could be redressed by it. In support of this view the learned chief justice cited numerous cases. So in *Jerome v. Ross*, 7 Johns. Ch. 830, in an opinion by Chancellor KENT, it was held that for a naked trespass for which compensation could be made in money, the party must resort to his action of trespass; that an injunction will not be granted, unless there was an intention to actually destroy the subject in dispute, and not merely to injure it.

"*Jarden v. Phila., Wilm. & Balt. R. Co.*, 8 Whart. 502, was urged as sustaining the bill. That however was the case of a bill to enjoin a corporation from taking permanent possession of land before a performance of the conditions which preceded its right to possession. The street was to be opened and the damages were to be paid. Neither had been done. The case is not analogous to the one under consideration.

"Looking at the facts found by the master, the evidence not only fails to establish the right of the appellee in the fence or in the ground on which it stands, but it shows the right to both to be in the appellant. Furthermore, if the latter should remove the fence without right the trespass would be temporary only, and could be compensated in damages. The damages recovered would replace it. While the fence was probably convenient for the complainant, it was not as necessary for the enjoyment of his lot as the fixtures were to the enjoyment of the hotel in *Clark's Appeal, supra.*"

In *City of Council Bluffs v. Stewart*, 51 Iowa, 885, the court said: "The grounds for the injunction claimed by the plaintiff, as alleged in the petition, are that by the condemnation proceedings, and the payment of the award to the sheriff, the plaintiff became entitled to the possession of the condemned property, and that the act of the defendant in taking possession of the buildings, and proceeding to fill them with ice, is a trespass upon plaintiff's property which will retard the opening of the street, delay the plaintiff in making the improvement, and cause irreparable injury. The doctrine is elementary that a party who has a plain, speedy and adequate remedy at law cannot resort to an action in equity. * * * Courts of equity will under certain circumstances interfere by injunction to prevent trespasses upon real estate; but to authorize such interference there must exist some distinct ground of equitable jurisdiction, such as the insolvency of the party sought to be enjoined, the prevention of waste or irreparable injury, or a multiplicity of suits. See 2 Story Eq. Jur., § 928; *Cowles v. Shaw*, 2 Iowa, 496; *Gibbs v. McFadden*, 39 Iowa, 871. In section 928 of Story Eq. Jur. it is said: 'If the trespass be fugitive and temporary and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly indeed courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property, would be ruinous or irreparable, or would impair the just enjoyment

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of the property in the future.' The petition it is true does allege that the acts complained of will work irreparable injury to the plaintiff; but the specific facts averred in the petition do not justify this general statement. The most that can be claimed is, that if the ice shall be in the buildings in question at the time that plaintiff may desire to use the premises for the proposed improvements, the expense of removing the buildings will be increased. But there is no allegation of insolvency of the defendant. For any wrongful act of the defendant increasing the expense of occupying the premises, after the plaintiff became entitled thereto by condemnation proceedings, the defendant would be liable for damages in an action at law. The recovery of such damages would afford adequate compensation. It cannot be claimed that the mere filling of the ice-houses with ice would work an injury ruinous or irreparable, or impair the just enjoyment of the property in the future."

In *Goodell v. Lassen*, 69 Ill. 145, the act complained of was a tenant's threatened attaching to the leased building a sign of three gilded balls to indicate his business of pawnbroker, there being no stipulation in the lease as to the signs to be used or where they should be placed. The court said: "The mere act of attaching the sign to the wall of the building could not be said to be the cause of irreparable mischief, but the allegation is, the sign indicates a disreputable business, will injuriously affect the trade or business of the other tenants, and will injure the house for rental purposes. It is not perceived how there could be, in the nature of things, any injury to the reversion. Whatever damage the sign may cause, it is manifestly to the interests of the tenants, for which they could maintain an appropriate action.

"We are unable to appreciate how a temporary inconvenience, as this necessarily is, for it must terminate with the lease, can be said to be the cause of irreparable injury. Before a court of equity would lend its aid to enjoin a mere trespass, the facts and circumstances must be alleged in the bill, from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy. *Livingston v. Livingston*, 6 Johns. Ch. 497.

"No such facts are shown by the record. It does not appear when the leases of the other tenants will expire — whether before or after that of appellee. Nor is it shown that a distasteful sign placed on the building, without the consent of the landlord, would constitute any defense for the non-payment of rent. Whether it would injuriously affect the trade or business of the other tenants by driving away their customers, is a question that can be better tried in a court of law, if they shall see fit to bring such an action.

"The most that can be said of this sign is, that it is a temporary offense against the taste of the other tenants, and perhaps to some of their customers. No doubt, if one interferes with his tenants so as to disturb their enjoyment, and thereby cause loss of rent, the landlord may have an action. *Taylor Land. and Ten.*, § 178. But if the interruption is a mere temporary disturbance, it is in no just sense an irreparable injury."

In *Whalen v. Dalashmutt*, 59 Md. 250, the court said: "The court will never grant an injunction to restrain a mere trespass, where the threatened injury is not irreparable and destructive of the plaintiff's estate, but is or will be sus-

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ceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. In this case, it is true, the plaintiff alleges in his bill that the defendant is about to erect upon the pavement a permanent iron awning post to be inserted into the soil, for the purpose of support to a permanent awning frame, and 'which said erection will operate as a continuing trespass, to the great and irreparable injury of the property of the complainant.' But the plaintiff has failed to show, either by allegation or proof, how and in what manner such irreparable injury is to follow the erection of the small awning post at the point designated on the plats, if it should be erected. Upon the assumption that he has a good legal title to the small strip of ground in controversy, and that he will be able to establish such title, we utterly fail to perceive how he will be irreparably injured by the erection of the post, or why he will not be able to recover full and ample compensation for any injury that he may suffer by reason of such erection in an action at law. And if that remedy be full and adequate, it is clear, upon all the authorities, the plaintiff is not entitled to the extraordinary aid of the court of equity by way of injunction."

Trespass which may ripen into an easement may be prohibited by injunction. *Johnson v. City of Rochester*, 13 Hun, 285.

Insolvency of the trespasser is an element of irreparable injury. *Musselman v. Marquis*, 1 Bush, 463.

Generally, any nuisance may be prevented by injunction. High Inj., § 739, etc. And so of waste. Id., § 649, etc. *Blanc v. Murray*, 86 La. Ann. 463; n. c., 51 Am. Rep. 7

 BUDD V. MULTNOMAH STREET RAILWAY COMPANY.

(13 Oreg. 371.)

Action — trover — conversion of capital stock.

Trover lies for conversion of shares of capital stock of a corporation.

TROVER. The opinion states the case. The defendant had judgment below.

H. T. Bingham, and J. C. Bower, for appellant

D. W. Welty, and J. C. Moreland, for respondent.

LORD, J. This is an appeal from a judgment upon demurrer. The action was in trover for the conversion of certain shares of the capital stock of the corporation defendant. The complaint in substance alleges that the plaintiff was the owner of one hundred

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shares of the capital stock of said corporation defendant, of the value of \$10,500, and that the defendant wrongfully took possession of said shares, and disposed of and converted the same to their own use. The demurrer to the complaint was sustained upon the ground that trover would not lie for the conversion of shares of stock. The only question therefore presented by this record is: "Are the shares of stock such personal property as an action for conversion will lie for their appropriation? What is stock or a share of stock?" A share in a corporation is a right to participate in the profits, or in the final distribution of the corporate property *pro rata*. *Field v. Pierce*, 102 Mass. 261. "A share or interest in the capital stock of a bank or other corporation may be defined as the right to *pro rata* periodical dividends of all profits, and if the corporation is not immortal, a right to a *pro rata* distribution of all its effects on its death." *People v. Commissioners, etc.*, 40 Barb. 353. "Shares of stock are generally considered to be personal property," Bouv. Law Dict. "Stock," and by our statute are to be deemed personal property and subject to attachment, execution, levy and sale as such. Misc. Laws, chap. 7, § 13. They are not "chattels, personal, susceptible of possession, actual or constructive," *Arnold v. Ruggles*, 1 R. I. 166; "but they are," says SHAW, C. J., "if not choses in action, in the nature of choses in action; and what is more important, they are personal property." *Hutchins v. State Bank*, 12 Metc. 421.

Of the nature of shares and the right or interest in them considered as such, DUFFEE, C. J., said: "Does the term 'share' denote a thing in possession, or does it denote the mere right to a thing not in possession, but in action, and therefore subject to be claimed or demanded? We have shown that a right to a vote as a member of the corporation, and a right to the dividends of the profits of the concern, make all the beneficial interest that is called a share. But these rights subsist only in law or in contract. The individual invested with them has them *in præsenti*, and in virtue thereof claims things that are not at any time all present, uniting possession with right; for all votes save one, and all dividends save one, must always exist *in futuro* — a chose not in possession — a thing subject to be demanded — money payable at a future day. A share then is a mere ideal thing; it is no portion of matter; it is not susceptible of tangible and visible possession, actual or constructive. Yet in common parlance, we say that a man is possessed of a right, and it is a

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sufficiently intelligible mode of speaking ; but then the meaning of the term 'possession' must be understood to be modified by the object to which it relates. If a right be an ideal thing merely, or something existing but in law or contract, the possession must be ideal, subsisting from law or contract. To be possessed of a share therefore is to be invested with the rights which constitute it, to pass in and succeed to the station, relation, and powers of the former shareholder, and to become a corporation in reference to the particular share. But it is quite evident that this cannot be accomplished but by actual transfer, or by operation of law. This only can give (in common parlance) the possession of a mere right, or those rights denominated a share in a corporation."

Whenever therefore these things are done or happen, whether by means of contracts or by operation of law, by which an individual is invested with those rights which constitute a share in the stock of a corporation, he is, so to speak, possessed of such share — the owner of it. It is not the certificate which confers the right to or ownership of the share, nor is the certificate the stock itself, but only the paper evidence of the right or title to the share which may be used for the purpose of symbolical delivery, as the share itself, being intangible, is not susceptible of actual delivery. As thus evidenced, the certificate is the written expression of the legal existence of such share, giving to that which is intangible a tangible representative, by which as a convenient method, it may be sold, transferred, or speculated in as other personal property. A share then exists in legal contemplation, and is personal property, which may be dealt with, enjoyed, and subjected to judicial process as such, and of which the certificate is not the property itself, but only documentary evidence of title to it. Being thus impressed by law with the attributes of personal property recognized as such, capable of being enjoyed, dealt with, and subjected to judicial process it would seem to follow that whenever there has been some repudiation by the defendant of the owner's right to the share, or some exercise of dominion or control over it inconsistent with such right, he is guilty of a conversion, and ought to be held liable in trover. A conversion is defined to be "a wrong, consisting in dealing with the property of another, as if it were one's own, without right." Abb. Law Dict., "Conversion." Judge Cooley defines it to be : "Any distinct act of dominion, wrongfully exerted over one's property in denial of his right, or inconsistent with it, is con-

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version." Cooley Torts, 448. Mr. Bigelow says: "It may be laid down as a general principle that the assertion of title to or an act of dominion over personal property, inconsistent with the right of the owner, is a conversion." Big. Lead. Cas. 428. Nor is it necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use. "Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's rights?" If he does, that is in law a conversion, be it for his own or another's use." Bac. Abr., "Trover." The wrong lies in the interference with the owner's right to do as he will with his own. Whoever does this in any manner subversive of the owner's right to enjoy or control what is his own, is guilty of a conversion. *Ramsby v. Beezley*, 11 Oreg. 51. But the defendant contends that a share of stock, being intangible, is incapable of being taken and wrongfully converted to the use of another; and as a consequence, that the allegation that the defendants wrongfully took, disposed of, and converted the said shares to their own use is the statement of an impossible fact, and tenders no issue. In support of this position, *Sewall v. Bank of Lancaster*, 17 Serg. & R. 285, and *Neiler v. Kelley*, 69 Penn. St. 407, are cited and relied upon.

In the latter of these cases, SHARSWOOD, J., said: "A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of the corporation, never realized except upon the dissolution and winding up of the corporation, with the right to receive, in the meantime, such profit as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation than it can for the interest of a partner in a commercial firm."

As based upon the common-law fiction of property lost and found, in actions of trover, which prevails in that State, and which lay only for the tangible property capable of being identified and taken into actual possession, the correctness of the decision is not questioned. "But," as was said by PARKE, C. J., "what matters it whether the thing itself is capable of being taken into hand and carried away, so long as it is personal property of as substantial value as any other; and in no case can the thing itself be recovered in this form of action, but only its value. There was force in the claim originally, when trover was confined to property lost. From the nature of the action it could not then lie unless the property was tangible. The fiction of lost property is still retained in decla-

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rations of this kind, but the allegation has long since ceased to be substantial, and there is no longer any reason for requiring that the property should be tangible. * * * If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted, that the conversion of the paper constituted the entire wrong. The real act done in such case is precisely the same as done here, no more, no less; and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. Conversion is the gist of the action of trover. Everywhere it is so held. The stock in both cases was converted; and we think in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained."

In *Payne v. Elliott*, 54 Cal. 339; s. c., 35 Am. Rep. 80, in an able opinion by McKEE, J., it was held, in an action for the conversion of shares of stock of a corporation, that "it is the shares of stock" which constitute the property, and not the certificate; and that an action is maintainable for the conversion of the share of stock which the certificate represents, as well as that of the certificate.

In *McAllister v. Kuhn*, 96 U. S. 87, the identical objection was made which is raised here. There the judgment had been taken by default, and confessed whatever had been properly pleaded, as the demurrer here admits.

In that case WAITE, C. J., said: "If the statements contained in the petition are true, and McAllister had actually converted the stock to his own use, Kuhn was entitled to damages. By his default, whatever had been properly pleaded was confessed. Had issue been joined upon the averment of conversion, it would have been necessary to show the existence of facts which in law constituted a conversion; but for the purposes of pleading, the ultimate fact to be proved need only to be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings. We think the complaint does state all the facts necessary to constitute a cause of action."

Under our system, the technical difficulty which embarrassed the common-law action for trover, and made it only applicable for the conversion of tangible property, no longer exists, and the action may be maintained for the conversion of every species of personal

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property. We think the complaint states the necessary facts to constitute a cause of action. The demurrer is not well taken, and the judgment must be reversed.

Judgment reversed.

JACOBSEN V. SIDDAL

(12 Oreg. 280.)

Criminal conversation — evidence of marriage — effect on relations of parties

In an action of criminal conversation the marriage may be proved by witnesses of the ceremony or by the parties

Where the intercourse was forcibly obtained, the plaintiff may show the effect of it upon the wife's body and mind and may also show the terms upon which he and the wife lived together.

ACTION of crim. con. The opinion states the case. The defendant had judgment below.

J. H. Bird, for appellant.

W. Lair Hill and *F. P. Mays*, for respondent.

LORD, J. This action was brought by the plaintiff to recover damages for alleged criminal conversation with his wife. Upon issue being joined the trial proceeded, and the plaintiff gave and offered the evidence set forth in the bill of exceptions, when the defendant moved the court for a nonsuit upon the grounds, (1) that plaintiff had failed to prove the alleged marriage; (2) that he had failed to prove any damages sustained by him, or any facts from which a jury would be authorized to find damages for the plaintiff; and (3) that he had failed to prove a cause sufficient to be submitted to a jury. The court below granted the motion, and judgment was entered in favor of the defendant for costs, from which this appeal has been taken.

The basis of the plaintiff's right to recover arises out of the alleged relation of husband and wife, and the fact of marriage must be proved by direct evidence. By the bill of exceptions it appears that after the plaintiff and his wife had testified directly to the fact of marriage, a certificate of the same was offered in evidence, to which several objections were made and sustained. Whether the

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objections were well taken or not is immaterial, as the plaintiff was competent to testify to the marriage. The contract of marriage, or its solemnization before a minister or magistrate, may be proved by the testimony of an eye-witness, and for this purpose a party is competent.

In *Bissell v. Bissell*, 55 Barb. 329, the court say: "In cases affecting the legitimacy of issue, right of succession to property, and many other cases, such a contract may be proved by circumstantial evidence, by admission of the parties, by living together as man and wife, etc. But there is another class of cases, such as prosecutions for bigamy, crim. con., etc., in which there must be direct evidence of the actual marriage. By actual marriage is meant, not the solemnization before a minister or magistrate, for as has already been shown, no such solemnization is requisite, but what is intended is that the actual making of the marriage contract between the parties must be proved by direct evidence, and not left to be inferred from circumstances, and admissions, and the like. Until by recent legislation the wife was made a competent witness in actions in which her husband is a party, it is evident that when a marriage of this description was contracted in the absence of witnesses, there was no means of furnishing the direct proof required in this class of cases, and offenses of this description might be committed with comparative impunity. But now the wife being made a competent witness, her testimony, if corroborated and entitled to credit, is sufficient to establish the marriage.

The certificate properly authenticated, or the record of the marriage, is not essential to the establishment of the relation of marriage, but the party may prove the fact of marriage. The record shows that both the husband and wife in substance testified that they were such; that they were married about eight years ago in Iowa; and that ever since they had lived together as husband and wife; and that this testimony was received without objection. In *Kilburn v. Mullen*, 22 Iowa, 503, the court held that record evidence is not indispensable to prove a marriage, but that the fact may be established by witnesses having knowledge thereof. This was an action for criminal conversation, and the court, by DILLON, J., followed the rule laid down in *State v. Wilson*, 22 Iowa, 364, in which he said: "We are aware of the state of the authorities touching this question, but do not deem it necessary to enter at large upon its discussion. We have heretofore made a similar ruling in rela-

tion to bigamy, where the rule should be at least as stringent as in a prosecution for adultery." *State v. Williams*, 20 Iowa, 98.

"Where direct evidence of the marriage is required," said PERLY, C. J., "other evidence besides the register may be made by the testimony of witnesses present at the marriage, or of the parties themselves when competent." *State v. Marvin*, 35 N. H. 22. See also *Com. v. Norcross*, 9 Mass. 492; *Com. v. Littlejohn*, 15 Mass. 163. Our statute has very materially invaded the common-law rule, and subject to the restrictions enumerated, the husband or wife is a competent witness. Code, §§ 700, 702; Abb. Tr. Ev. 684. Subject to these limitations and for the attainment of truth, it is not perceived why all persons having knowledge of the facts, and especially those ordinarily most conversant with them, the parties themselves should not be permitted to testify. Besides it seems if the testimony was incompetent, but was admitted without objection, the court will treat the testimony as competent on motion for nonsuit. *Janson v. Brooks*, 29 Cal. 214.

The next objection is that the court erred in excluding testimony offered to show the terms on which the plaintiff and his wife lived together, and the effect the criminal act produced on her body and mind. The substance of the allegation in the complaint is, that the carnal intercourse was effected by forcible ravishment. The defendant contends that the gist of the action is loss of service. In a note to Chitty Pleading, margin. pages 642, note *b*, and 856, note *a*, it is said the wrong complained of is not immediate, but consequential; the gist of the action not being the supposed assault on the wife, but the consequent corruption of the body and mind of the wife.

In *Weedon v. Timbrell*, 5 T. R. 360, Lord KENYON said: "It is material to consider what is the gist of the action. The plaintiff contends it is the criminal act; but that I deny. I think it is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency."

And it was held that the gist of the action was the loss of the society and comfort of his wife. It is the loss of consortium which is the gist of the action. "The plaintiff," said ALLEN, J., "cannot maintain this action for an injury to the wife only; he must prove that some right of his own, in the person or conduct of his wife, has been violated. * * * His interest is

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expressed by the word '*consortium*'—the right to the conjugal fellowship of the wife; to her company, co-operation, and aid in every conjugal relation. * * * The essential injury to the husband consists in the defilement of the marriage bed; in the invasion of his exclusive right to marital intercourse with his wife; and to beget his own children. This presumes the loss of the *consortium* with his wife; of comfort in her society in that respect, in which his right is peculiar and exclusive." *Bigaouette v. Paulet*, 134 Mass. 123; s. c., 45 Am. Rep. 307; *Fry v. Derstler*, 2 Yeates, 278; *Wood v. Matthews*, 47 Iowa, 410; Abb. Tr. Ev. 405; 1 Chitty Plead. margin. 134, 167. Nor are the rights of the plaintiff affected in such cases, whether the act was done by the consent of the wife, or was accomplished forcibly and against her will, except in aggravation or mitigation of the injury. "The common law, in giving this remedy, instead of making the husband's right of action depend on his wife having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent but was overcome by force, and the action has been sustained just the same, whether, as a matter of fact, her will consented or she was outraged by actual violence." Bac. Abr. "Marriage and Divorce," 551, 553; 3 Bl. Com. 139; 1 Chitty Plead. (16th Am. ed.) 140, 141, 150, 151, 188; 2 Hill. Torts, 507; *Forsythe v. State*, 6 Ohio, 23. And there seems to be no basis in justice or policy for the position that if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape, the private remedy is either taken away or suspended. Cooley Torts, 86, 90; GRAVES, J., in *Egbert v. Greenwalt*, 44 Mich. 246; s. c., 38 Am. Rep. 260. The injury done the husband consists in the dishonor of his marriage bed, the loss of his wife's affection, and the comfort of her society, as well as any pecuniary injury for loss of services. The actual injury, and the extent of it, very greatly depends on their prior relations, and the consequences, as between them, resulting from her defilement or defection. The plaintiff had a right to show the terms upon which he and his wife had lived together, and the practical consequences resulting to their married life from the injury alleged. Upon the question of damages the relation of the plaintiff to his wife, the circumstances of their domestic life, etc., may be shown. Cooley Torts, 224, 225; Hill. Torts, p. 509, § 21. But this the counsel for the defendant concedes, and admits the error assigned to be well taken, if the gist of the action

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is not specifically for loss of services, and the pecuniary injury confined to it. But as the law is otherwise, the judgment must be reversed, and a new trial ordered.

Judgment reversed.

SULLIVAN v. OREGON RAILWAY AND NAVIGATION COMPANY.

(12 Oreg. 392.)

Evidence — declaration — res gesta — damages — exemplary.

In an action for unlawful ejection from a railway train, the description of the occurrence given by the plaintiff, to a third person, immediately afterward, in the absence of the defendant's agents, is incompetent. *

A corporation may not be charged with exemplary damages for the wrongful act of its servant, unless it directed or ratified it, or was grossly negligent in the employment of the servant. †

ACTION for unlawful ejection from a railway train. The opinion states the case. The plaintiff had judgment below.

Rufus Mallony and F. P. Mays, for appellant.

Gates & Wilson and J. E. Atwater, for respondent.

THAYER, J. This appeal is from a judgment rendered in an action to recover damages in consequence of the appellant having been put off a train of cars alleged by him to have been owned and operated by the appellant. The respondent alleged in his complaint that on the 10th day of October, 1883, he went aboard of said train of cars at Dalles City, a regular station on the line of appellant's road, for the purpose of being conveyed to Portland, and that the conductor thereof, after the cars had started and were in motion, ejected him therefrom, by reason of which he was thrown under the wheels of the cars, and had his right foot so badly crushed that it had to be amputated. The language of the allegation of the complaint referred to is as follows: "That after the said train of cars had gone about one-fourth of a mile from said Dalles City, and while said train of cars was rapidly moving along its said railway, the defendant, by its agent and employee, who then had control, care,

* See *City of Galveston v. Barbour* (62 Tex. 172), 50 Am. Rep. 519.

† To same effect, *Louisville, etc., R. Co. v. Guinan* (11 Lea, 98), 47 Am. Rep. 279.

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and conduct of said train of cars for defendant, carelessly, negligently, and with force, ejected this plaintiff from its said train of cars, and caused him to fall from said cars to the ground while the same were so rapidly moving, and by reason of the said careless, negligent, and wrongful acts of the defendant, the plaintiff was thrown under the wheels of said cars, which cars then and there, on account of the wrongful acts of the defendant, as aforesaid, ran upon and over the plaintiff, and crushed and wholly destroyed his right foot."

The amount claimed, of general and special damages, was \$50,000. The appellant took issue respecting ownership and operation of said train of cars, the ejecting the respondent therefrom, and the damages alleged by respondent to have been sustained. It also set up its answer that the injury received was in consequence of the appellant's carelessness and negligence. It appears from the bill of exceptions that the controversy at the trial was mainly as to whether the conductor of the train pushed the respondent off the cars, or that he jumped off at his own instance. The respondent testified that the conductor pushed him off while the cars were in motion; the conductor, on the contrary, denied that he touched him; testified that he did not know when he got off the cars; that he went and pulled at the bell-rope, and when he looked around the respondent was off. Another witness, called by appellant, who seems to have been a passenger aboard the train, testified that he saw the whole affair, and corroborated the testimony of the conductor; stated that the conductor did not touch respondent. He also testified that the respondent jumped off the train. The jury returned a verdict for the respondent for the sum of \$11,459, upon which the judgment appealed from was entered. The questions submitted upon the appeal involve the competency of some of the evidence given to the jury, and the correctness of a part of the instructions of the court to the jury, which we now proceed to notice.

The bill of exceptions also shows that the respondent was a witness in his own behalf; that after he took the stand and was sworn he stated that he went aboard the train of cars at Dalles City on the 10th day of October, 1882; the train was bound west; that it was in front of the Umatilla House where he went onto the train; that he went aboard of it for the purpose of going to Portland; that the train was an Oregon Railway & Navigation Company's train,

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engine No. 80, marked "O. R. & N. Co."; that it was a passenger train; that one Garfield was the conductor.

[Minor point omitted.]

The witness then proceeded to narrate the circumstances of the injury. He testified that soon after the train started Garfield came out of the baggage car while he was standing on the platform at the forward end of the smoking car. A man named Clayton was with witness. There were two other men on the platform; the passengers went inside. While we were conversing Garfield came out of the baggage car, and I spoke to him for a ride to Portland, as a favor from a railroad man. He said, "I don't know you, and don't want to." Clayton handed him his pass while we were talking. Garfield said to me, "you will have to get off this train; you can't ride. Witness told him, "All right; stop his d—— train and he would get off." Witness then states that the conductor pulled the bell two or three times to stop the train, but it did not stop; that thereupon the conductor pushed him off the train, whereby he received the injury complained of. After the witness had been examined he called Charles Pool as a witness, who testified, among other things, that he saw the train pass west, and shortly after it had gone heard some one cry out "Oh, say! Oh, say!" Went to where the person was and found the respondent. The respondent's counsel then asked the witness this question: "What did respondent say?" The appellant's counsel objected to the question, upon the grounds that the testimony was not competent. The court overruled the objection, and the witness answered: "I asked him what was the matter, and he said: "The son of a bitch pushed me off" or "threwed me off;" I am not sure which. This was two or three minutes after the train passed. The train stopped just as it came through the cut out on the flat."

The respondent then called two other witnesses to prove same facts, who were each asked same question, which was objected to by appellant's counsel upon the same grounds, and the same ruling was made by the court, and exception taken. One of the witnesses answered that respondent said upon the occasion referred to, "Garfield pushed me off;" and the other, "that he had been pushed off the train." This testimony was calculated to influence the verdict of the jury, and if incompetent, the judgment entered thereon should be reversed. Such testimony has in many instances been admitted

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in evidence, and courts have attempted to give reasons for holding it competent. The line of authorities in this country which maintain its admissibility seems to have commenced with the case of *Comm. v. McPike*, 3 Cush. 184. The courts that have followed the ruling in that case have frequently manifested a sort of hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestæ*, and been content to place their decisions upon that ground.

That mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the nature of the case is susceptible of shall be produced, and it leads to uncertainty and doubt. It is very easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gestæ*, but extremely difficult to explain it, and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained, or its nature and quality be ascertained, by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred but it is never the act itself, nor the mere evidence of it.

If a party were to be set upon and wounded, his narration of the circumstances attending the affair, or declarations as to who inflicted the injury, made after the transaction was ended and his assailant gone, would be no part of the occurrence; it could only be his own account of the affair. None of the class of cases referred to furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some of them that they must have been made at the time the act transpired; but in others, that a considerable time may elapse and they still be such part; that each case must depend upon its own peculiar circumstances, and be determined by the exercise of a sound judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by "a sound judicial discretion" that the court before whom the trial is had must judge as to whether the transaction was continuing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony; the court would consider the facts and circumstances surrounding the affair, and

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determine therefrom as to its competency; but if, on the other hand, it is to be understood that the court is to decide the question in accordance with the judge's notions as to the justice of the particular case, then it is afloat without any chart to direct it. Precedents, under that view, would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character which had been adjudicated upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject, as law is, as a rule, applicable to a class of cases which are alike in principle.

The question is too important to be left to such uncertainty, and there is no occasion for leaving it to be determined by vague speculation. The authorities upon the subject are quite numerous, and are widely different. The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence. They have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction. *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 41. This appears to me to be as liberal a rule as any court can consistently with the rules of evidence sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence except under the condition of circumstances above referred to. Section 672, Civil Code, provides that a witness can be heard only upon oath or affirmation, and he can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences or the declarations of others are admissible. And section 676, Civil Code, provides that where the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence as part of the transaction. These provisions of the statute are declaratory of the law upon the subject, and are binding upon the court; they limit the right of a party, in the introduction of that character of testimony to those cases where the declaration forms part of the transaction which is in dispute, and provide that it is evidence as part of it.

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This statute undoubtedly lays down the rule as broadly as many of the decisions of the court have done, especially some of the later ones, see *Waldele v. New York C. & H. R. R. Co.*, 95 N. Y. 274; s. c., 47 Am. Rep. 41, and *People v. Ah Lee*, 60 Cal. 85; but many others have gone a most surprising length beyond it. Among them is that of *Insurance Co. v. Mosley*, 8 Wall. 397. That decision and all of a kindred nature cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction made after it has ended are a part of it. It would be a moral impossibility. Take the case under consideration as an example. The respondent went on to the appellant's train of cars at The Dalles, and desired to be carried to Portland without paying fare. The appellant's conductor refused to carry him upon such terms. After the train started and had gone a short distance the respondent is found off the train upon the ground in an injured condition, and he alleges as a cause of action against the appellant that the conductor pushed him off. The appellant in its answer denies that the conductor pushed him off, and avers that he jumped off. This is the principal issue in the case. The affair, whatever it was, occurred aboard the train of cars; everything that transpired between the conductor and the respondent took place there and ended fully and completely when the respondent left the cars, whether he was pushed off or jumped off. When the respondent went from the cars to the ground and the train had passed on, the transaction between him and the conductor was as effectually terminated as it was a month later. In a very few minutes after the train had passed the spot where the respondent struck the ground three persons were attracted toward him, and naturally inquired how he came in that condition, and he answered as an enraged person would be likely to under the circumstances, as before stated, and which implicated the conductor in a reckless and grievous wrong to him. Had the respondent complained of pain and suffering it would doubtless have been competent to have given that fact in evidence as proof of his injury; but to prove what he said the conductor did, in order to attach the blame to the latter, and in his absence, is a distortion of the rule which permits the declarations of a party to be given in evidence. How can this statement be claimed to have been a part of the transaction between the respondent and the conductor when the affair

was at an end, and the latter party probably a mile away at the time? I am unable to indorse any such view. The statement of the respondent at the time referred to, as to how he came off the cars, is as undoubtedly hearsay evidence as any narration of the affair he has given since that time. It occurs to me that courts at *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or were incompetent upon the grounds that they were only hearsay, if they would consider whether the transaction to which they related was continuing when they were made, or terminated at the time, and make that the test of the matter, and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that subject.

The rule is very properly stated in *Williams v. Bowdon*, 1 Swan, 282, in the following language: "The declarations are evidence because they are part of the thing doing; if therefore the thing shall have been done and concluded, declarations then made are not evidence." This is in consonance with the rule as declared in the provision of the Oregon statute before referred to; but the legislatures of some of the other States have, as I view it, authorized its extension. It is declared by statute in the State of Georgia that "declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of *res gestæ*." Code Ga. 1873, § 3773. Under a provision of that character a declaration made after the transaction might be admissible; but the rule here is more restricted, and the declaration was improperly admitted. This disposes of the case, and it would be unnecessary to say any thing more if it did not have to go back for a new trial; but as it has to take that course, it becomes our duty to pass upon other questions assigned as error.

[Minor consideration omitted.]

The court, after charging the jury that it was conceded in the case that just previous to the accident the respondent was on board the train and attempting to ride to Portland thereon without paying fare, and that under those circumstances the agents of the

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company had a right to put him off if he refused to pay such fare, using reasonable care and caution in so doing, and that if in putting him off under such circumstances, the respondent was injured, without negligence or blame upon the part of the appellant, then it was not liable for such injury; but it was its duty to first stop the train, and then put the respondent off; and if the appellant through its agent put the respondent off while the train was still in motion, and thereby caused the injury, the appellant would be liable therefor; and that if the jury found that the injury to the respondent was caused by the negligence or willful misconduct of the appellant, committed through its agent, and that the respondent did not contribute to it by his own negligence, they should find for the respondent, and that the measure of damages would be, (1) for the expense of procuring the necessary medical attendance, to an amount not exceeding \$150, the sum alleged; (2) for the necessary expense of securing care and nursing, to an amount not exceeding \$309; (3) for bodily suffering, impaired working capacity, mutilation and disfigurement necessarily resulting from the injury; (4) for such mental suffering, apprehension and anxiety as necessarily result from the injury, proceeded to instruct them, as a fifth item of damages, that if they should find from the evidence that the injury was malicious and willful, or was caused by gross and wanton negligence amounting to a total disregard of all social obligations, they would allow such sum as they would deem just and proper by way of punishment, and to deter others from such malicious and grossly and wantonly negligent acts in the future.

This last instruction was excepted to by the appellant's counsel, and it becomes our duty as before indicated to consider its correctness. It has in many instances been seriously questioned whether exemplary or punitive damages could properly be allowed in any private action. It would be extremely difficult if not impossible to give any good reason for such allowance, since the rule giving actual damages has been so liberally construed; but however that may be, it seems to have attached itself to our jurisprudence, and we are made recipients of its benefits and compelled to endure the hardships it imposes. However I am opposed to extending the rule to cases to which it was never intended to apply, and would work injustice if the application were enforced. When the conduct of a person has been willful, malicious and wanton or reckless,

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and an injury has resulted to another in consequence of it, a jury might with a semblance of reason, in an action to recover damages for such injury, assess something more than a mere compensatory sum therefor. That course doubtless would have a salutary effect in two respects; would visit the wrong-doer with wholesome punishment, and afford an example calculated to deter others from the commission of malevolent acts; but to attempt to extend the doctrine so as to visit the punishment upon innocent parties is, to my mind, unreasonable and unjust. I cannot see any principle upon which an employer, whether a natural or artificial person, can be made liable for the acts of his or its servant, beyond compensatory damages, unless the employer directed the doing of the act, or ratified it after it was done. In the case at bar the railroad company had been guilty of no wanton or reckless act in the premises, whatever its conductor may have done; then why should it be punished? It is made liable for damages by the acts of its conductor by reason of the duty it owes to the public. It has impliedly stipulated to observe certain duties and obligations, among them that it will transport passengers upon its train of cars safely and with reasonable dispatch, and that it will insure them proper treatment while in transit; and its duty and obligation may be violated through the acts of its employees. The act of the conductor, whether it be negligent, malicious or reckless, will effect such violation the same in the one case as in the other. Should the conductor wantonly and cruelly mistreat a passenger, the company is made liable, not strictly for the act of the conductor, but for the reason that the company has failed to perform the duty it undertook, and the obligation it tacitly agreed to observe.

The acts of the conductor in the present case may have been so malicious and reckless as to indicate a depraved mind, and if such were the fact he ought to be punished for his wickedness; but by what rule of consistency can that punishment be inflicted upon the company? It did not obligate itself that it would not engage the services of anyone who would never display malice or exhibit recklessness, and it should not be made answerable for the sins of the conductor, except so far as they effected a breach of its contract before referred to. It is claimed however in the decisions of the courts, which hold that a railroad company is liable to exemplary or punitive damages, that the conductor of a train of cars is *pro hac vice* to be regarded the company itself; but this certainly is only a fic-

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tion of law. The fact that the company acts through agents in the transaction of its business is no more peculiar than where a natural person transacts his business through agents. The conductor usually has no pecuniary interest in the company beyond the stipend he receives for his services; he is not punished by the judgment against the company, whatever may be the amount of it. Corporations acquire their vitality by subscription for its capital stock. In this State one-half thereof must be subscribed before it is allowed to engage in the business proposed in its articles, then the stockholders have a meeting, and choose directors, who thereafter manage its affairs. The pecuniary interest, the real substance of the corporation, is represented by its stock; its entire assets belong to the owners of the stock. They may be persons in moderate circumstances, who have invested their surplus earnings in the purchase of the stock, relying upon dividends to be realized therefrom. It is the stockholders who are affected injuriously by a judgment against the corporation, and who are punished when exemplary damages are awarded in the action, and if there is any justice in a rule which allows it in such a case, I am apprehensive that I shall never be able to discover it. Different views are entertained upon the question by courts in the different States, and while those of quite a number of them have held that such damages were allowable against a corporation for the acts of its agents, yet those of a very respectable number of the other of the States have maintained to the contrary. I think the rule upon the subject laid down in *Cleghorn v. New York Cent. R. Co.*, 56 N. Y. 44; s. c., 15 Am. Rep. 375, the correct one, which makes the master liable for such damages when he is chargeable with gross neglect in the employment or retention in his service of an incompetent servant, knowing at the time of his unsuitability, or that he authorized or ratified the act of the servant in the particular case. The question as to whether the complaint is sufficient to permit the recovery of that character of damages in the case need not, under the view taken of the last point, be decided. It will not be amiss however to suggest that in order to recover exemplary damages in any case it must appear from the complaint either by direct averment or from necessary inference that the act occasioning the damages was done maliciously or was the result of the willful misconduct of the defendant, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them.

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The judgment appealed from is reversed, and the case remanded to the court below for a new trial.

LORD, J., concurs, except as to the last point discussed.

WALDO, C. J., dissented.

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(12 Oreg. 431.)

Execution — exemption — "wearing apparel" — watch.

A watch may be exempt from execution as "wearing apparel," upon affirmative proof that the amount of exemption is not exceeded.

INSOLVENT proceedings. The opinion states the case. The plaintiff had judgment below.

Weatherford & Blackburn, for appellant.

L. Flinn and *H. H. Hewitt*, for respondent.

LORD, J. This is an appeal from an order of the Circuit Court requiring the appellant, an insolvent debtor, to surrender and deliver up to his assignee, for the benefit of his creditors, a gold watch and chain, valued by his evidence to be worth from \$50 to \$70. By his deed of assignment the appellant transferred to his assignee all his property except such as was exempt from execution, but without any specification of such exempt property. The contention of the appellant is, that a watch and chain may be properly considered as an article "of wearing apparel," and as such it is exempt from execution, and protected by his assignment. Our statute provides that the "necessary wearing apparel owned by any person to the value of \$100" shall be exempt from execution if selected and reserved by the judgment debtor, or his agent, at the time of the levy, or as soon thereafter before the sale thereof as the same shall be known to him, and not otherwise. Code, § 297, subd. 2.

The question whether a watch is a necessary article of wearing apparel, and as such exempt, seems, from the decisions, to depend upon the particular facts, or attendant circumstances of each case, such as the value of the watch, the condition and business of the

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debtor, etc., and has been differently decided under different circumstances. *In re Steele*, 2 Flip. 324, the meaning of the term "wearing apparel," used in the bankrupt act, was carefully considered by HAMMOND, J., of the United States District Court for the western district of Tennessee. John Steele had been allowed and claimed no exemption except a watch which was described as "a plain old style single case gold watch which he had owned for twenty-five years or more, and which would scarcely sell for \$25." The question was, whether it could be held by him as exempt under the law exempting "other articles and necessities," and "wearing apparel." The learned judge said: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word "apparel," as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be rather a prominent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel, except watches, shall be exempt." Ark. Dig. 503; 4 James Bankruptcy, 58; Avery & Hobbs Bankruptcy, 68. The court allowed John Steele the watch.

In *Rothschild v. Boelter*, 18 Minn. 362, it was held that a silver watch and chain, worth \$40 or \$50, worn by the debtor, is not exempt under the statute as "wearing apparel of the debtor and his family." The court say: "That an article may be worn does not make it wearing apparel within this statute. The words are to be construed in this case according to the common and approved usage of the language, namely, as referring to garments, or clothing generally designed for wear of the debtor and his family." In *Gooch v. Gooch*, 33 Me. 535, it was held that a watch which the testator had been in the habit of carrying with his person does not pass by a bequest of his wearing apparel. WELLS, J., says: "The ordinary meaning of wearing apparel is vesture, garments, dress; that which is worn by or appropriated to the person. Ornaments may be so connected and used with the wearing apparel as to belong to it; there are implements, such as pencils and penknives, carried about the person, but not connected with the wearing apparel. These are not to be considered as clothing. To which class does a watch belong? It may not properly be called an implement, for it is used merely to look at; neither is it used as clothing or vesture.

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In its use it more nearly resembles the pencil or penknife. The court are of the opinion that the watch did not pass under the phrase 'wearing apparel.'" In *Sawyer v. Heirs of Sawyer*, 28 Vt. 251, it was held that a watch was not to be deemed wearing apparel. The court say: "Though a watch may have a further use than mere ornament, yet there is not enough to make it and its incidents wearing apparel." But on this point REDFIELD, C. J., thought otherwise, saying that "it seems to me that a watch which one wears and the chain and seals are dress and apparel." In *Smith v. Rogers*, 16 Ga. 480, an insolvent moved to exempt from a sale a watch that he claimed to be part of his "wearing apparel." His wife had claimed and been allowed a gold watch. The court say: "Various articles of property have from time to time been exempted by the legislature from this liability, but among these articles are not to be found watches, unless they come under the head of "wearing apparel." It is doubtful whether they can be made to come under that head; if however they can, we think that not more than one can be made to do so." In *Mack v. Parks*, 8 Gray, 520, which was an action of tort for taking the plaintiff's watch from his person by force, the court seems to have considered the watch as "part of his dress or apparel." As having some bearing upon this subject, see also *In re Thiell*, 4 Biss. 241; *In re Graham*, 2 Biss. 449; *Bumpus v. Maynard*, 38 Barb. 626; *Herman Ex.*, § 99.

The exemption however under our statute is limited to the "necessary wearing apparel owned by any person, to the value of \$100."

In construing the word "necessary" in such connection, the courts have been inclined to a liberal rather than a rigid construction. In *Towns v. Pratt*, 33 N. H. 349, under a statute exempting the "wearing apparel necessary for the debtor and his family," the court say: "The word 'necessary,' as here used, is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable." *Peverly v. Sayles*, 10 N. H. 356. "It would therefore include such articles of dress or clothing as might properly be considered among the necessities in contradistinction to the luxuries of life." *Davlin v. Stone*, 4 Cush. 359. If a watch is in no sense "wearing apparel," as some of the authorities indicate, the judicial construction of the word "necessary" is of no importance. On the other hand, it would seem that if a watch worn by a person may be considered as

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a part of his dress or apparel, the word "necessary," as judicially construed, would not so materially affect the meaning of the phrase "wearing apparel" as to exclude it. It is probably true that a watch is ordinarily worn more for convenience than as a mere luxurious ornament. But to determine whether it is one or the other, necessary or luxurious, as an article of dress or apparel, the value of the watch is allowed to have a controlling influence in determining that result. If the value of the watch be unreasonable, or too much money be invested in it, the law regards it, as justice to the creditors would require, rather as a luxury than a necessity. And under our statute this element of value would necessarily become an important factor, as the exemption of "wearing apparel" is limited to \$100. But as we have seen, upon the question whether a watch is a necessary article of wearing apparel, the authorities are conflicting. Upon the whole, our own judgment inclines us to the opinion that the phrase "necessary wearing apparel," as used in our statute, may include in it a watch of moderate value without doing violence to its meaning. We are not therefore prepared to say that a watch of moderate value is not a necessary article of wearing apparel, and as such exempt, when it is made to appear affirmatively that the watch and other articles of apparel selected or reserved do not exceed the amount limited by the statute.

"*Prima facie*, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any of such property, he must bring himself and property within the exception of some statute by proper proof. No property in his possession is exempt *per se*." *Dains v. Prosser*, 32 Barb. 291.

It lies with the party claiming property to be exempt to prove the facts affirmatively which go to establish it. Until it is made to appear, at least, what are the articles, and their value of wearing apparel, selected and reserved by the judgment debtor, the court cannot determine whether the privilege of the exemption laws has been properly exercised or abused to the injury of creditors. There is nothing in the deed of assignment, or in this record, to show what articles of wearing apparel, or the value of the same, which the appellant has reserved, except that he testifies that he has kept as exempt a gold watch and chain worth from \$50 to \$75. What other wearing apparel, and from the necessity of the case he must have retained some, the quantity and its value, he is silent about. The creditors have a right to know, and the facts lie within his

knowledge, and unless he shows affirmatively the facts which sustain his right to the exemption claimed, the court will hardly aid him by presumption. This the appellant has not done, and the record before us discloses no error.

The judgment must be affirmed.

Judgment affirmed.

GILL V. FRANK.

(12 Oreg. 507.)

Warehouseman — receipt — transfer of title.

Where a warehouse receipt runs to the bailor personally, and is not negotiable in form, the bailor may not effect a transfer of the title by mere delivery of the receipt without the consent of the warehouseman.

THE OPINION states the case. The plaintiff had judgment below.

Alfred F. Sears, Jr., and Raleigh Stott, for appellant.

M. G. Munley and E. B. Watson, for respondent.

LORD, J. This is an appeal from a judgment in favor of the plaintiffs by M. Koshland, the garnishee. The bill of exceptions shows that at the trial the plaintiffs introduced testimony tending to prove that the garnishee had property in his possession belonging to the judgment debtor at the time of the garnishment, of the value of \$1,400, and rested. The garnishee then introduced A. Bernheim as a witness in his behalf, who testified that he was the garnishee's agent and manager at his warehouse when the garnishment was made; that he received the property in litigation from the judgment debtor, and gave a warehouse receipt therefor, which was afterward returned to him, but that it was not returned to him by Frank, to whom it was issued, nor by Gross, to whom, by an indorsement on the back, it purported to be assigned. The garnishee offered the warehouse receipt with the assignment indorsed thereon in evidence. The plaintiffs objected on the ground and to the effect that the receipt and indorsement purporting to be an assignment thereof showed no delivery to Gross, which the court

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sustained. The correctness of this ruling is the only ground of alleged error it is necessary for us to consider. The contention of the appellant is that a transfer of a warehouse receipt operates as a transfer of the property in the hands of a warehouseman, and the delivery of the receipt is the delivery of the goods, and consequently that the receipt and indorsement was evidence of the fact that Frank was not the owner of the goods. Before applying the principles of law which we conceive are applicable to the case, it is well to note the facts to which they are to be applied. The warehouse receipt given by the garnishee and bailee to Frank, and purporting by its indorsement thereon to have been assigned by Frank to Gross, was a plain undertaking to deliver to Frank, his bailor, personally, the parcels of goods therein enumerated, upon the payment of certain charges, etc. It is without the words "or order," or any other form of words which may be construed into an agreement or offer of the garnishee to hold the goods intrusted to his care for anyone else. The evidence of the managing agent of the garnishee further shows that the receipt with its indorsement somehow came back into his possession, but how and in what way he does not know, except that he is certain it was not returned to him either by Frank or Gross, to whom it purported to be assigned. In the light of all the facts, the inference is very strong there never was any delivery of the assignment to Gross. Howsoever the return of the receipt may have been effected, the probabilities are it was for the purpose of having the transfer of the property accomplished through a new warehouse receipt. If this be true it shows that the parties did not expect or understand any change in the possession of the property would take place by force of the assignment, without the consent of the bailee. Nor is there any other construction which can be given to the facts as disclosed, that would be consistent with the contract of bailment, without subjecting the appellant to unfavorable criticism. It must be noted that as against third persons an attaching creditor is to be regarded as a purchaser in good faith and for a valuable consideration, and in order to defeat his right in the premises there must be such a change of possession or delivery of the goods as passes the property. When the terms of the receipt are such that the warehouseman offers or undertakes to deliver the property to whomsoever that receipt may be indorsed, a symbolical delivery may be effected by its assignment or delivery, and he becomes bailee to such assignee

in accordance with the terms of his contract. In such case, a delivery of the receipt is a symbolical delivery of the property itself. But when a warehouseman accepts the custody of property, and by his receipt as bailee restricts the promise or undertaking to deliver the property to his bailor personally, and upon the condition of the payment of charges, etc., a change in the possession of such property cannot be effected, so that his custody should become the possession of a stranger, without his consent or the violation of his agreement. He has got the possession of the goods, and his assent is necessary to effectuate a change in such possession whether the receipt is assigned or not. When it is proposed therefore to give an assignment to the effect of a delivery of the goods as against an attaching creditor, the receipt and its assignment, taken together, ought to be broad enough at least to authorize such a construction. It may not be amiss to observe that there is an important distinction between this case and *Solomon v. Bushnell*, 11 Oreg. 277. There the wheat receipt was in a form to authorize the construction given to it upon well-settled principles of law. It contained an express promise or undertaking of the warehouseman to his bailor "to deliver to his order," with usual conditions as to damages by fire and charges for storage. There was therefore no difficulty in construing its terms when indorsed and delivered, as a symbolical delivery of the property itself, and consistently with commercial usage as applied to other documents not negotiable in the technical sense. In *Hallgarten v. Oldham*, 135 Mass. 1; s. c., 46 Am. Rep. 433, HOLMES, J., ably examines the subject, and although the rule adopted in that State, as to delivery, when applied to an attaching creditor, is probably more strict than here, the principles of law which he applies to receipts of the character under consideration is peculiarly in point. He said: "The question is then, how the transfer of any document can have that effect. The goods are in the hands of a middleman, and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser, for the purpose of holding the goods, so that his custody should become the possession of the master. But this is not what happens, and it has been held that less would satisfy the law. A carrier or warehouseman in this case is not the servant of either party *quoad* the possession, but a bailee holding in his own name, and asserting a lien for his charges against all parties. He has possession of the goods, whether the document is trans-

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ferred or not. But it has been held that the principle of the rule requiring a delivery is satisfied, although the letter of it is not if the possessor of the goods becomes the purchaser's bailor. *Tuxworth v. Moore*, 9 Pick. 347; *Russell v. O'Brien*, 127 Mass. 349-354; *Dempsey v. Gardner*, 127 Mass. 383; s. c., 34 Am. Rep. 389. Now it is obvious that a custodian cannot become the servant of another in respect of his custody, except by his own agreement. And *a fortiori* when that custodian does not yield, but maintains his own possession, it is clear that his custody cannot inure to the benefit of another, as if it was the possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way therefore in which a document can be a symbol of goods in a bailee's hands, for the purpose of delivery to a purchaser, is by showing his consent to become the purchaser's bailee. It may or may not be true, that if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee, without more, on ordinary principles of contract. That is the argument of Benjamin on Sales, 676 *et seq.*, criticising *Farina v. Home*, 16 Mees. & W. 119, and Blackburn on Sales, 287. But the criticism and case agree in the assumption that the only way in which an indorsement of a document of title can have the effect of a delivery is by making the custodian bailee for the holder of the document, and that he cannot be made so otherwise than by his consent. The necessity for notice, in those cases where notice is necessary, stands on the same ground. If the custodian has not assented in advance, he must assent subsequently; and the principle is the same whether an express acceptance of a delivery order be required, or it is held sufficient if he does not dissent when notified. *Boardman v. Spooner*, 13 Allen, 353, 357; *Carter v. Willard*, 19 Pick. 1-3; *Bentall v. Burn*, 3 Barn. & C. 433. When a private warehouseman, who has an unfettered right to choose the person for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words "or order," or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger. He has not consented to become so, even under the principles argued for by Mr. Benjamin. And until he has consented to hold for some one else he remains the bailee of

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the party who intrusted him with the goods." In the case at hand the court was called upon to say whether the instrument as indorsed brought about a constructive delivery of the property. The evidence which preceded failed to show any delivery of the receipt as indorsed to Gross, or to account for its possession in the hands of the bailee, except in a way which strengthened the assumption that there was no delivery of it to Gross, and in the absence of any thing to show assent of the custodian of the property to hold it for any other, the legal construction of its terms, as regulated by well-settled rules of law, necessarily excluded its introduction in proof of the fact of the delivery. It was therefore inadmissible to show a symbolical delivery as against an attaching creditor.

As this action was commenced and the rights under it accrued prior to the recent act of the legislature making warehouse receipts negotiable, it has no application to the case. The judgment is affirmed.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
TEXAS.

PRESSLER V. STATE.

(19 Tex. Ct. App. 32.)

Criminal law — carrying pistol.

The defendant bought a pistol, carried it to his home eight miles distant, and on the way discharged it. *Held*, not a case of "carrying" a pistol, within the statute. (*See note, p. 384.*)

CONVICTION of carrying a pistol. The opinion states the case.

T. R. Jennings and Ingraham & Edwards, for appellant.

J. H. Burt, assistant attorney-general, for State.

HURT, J. This is a conviction for carrying a pistol. Appellant bought the pistol in the town of Nacogdoches on the 10th day of May, 1884. He lived about eight miles from said town. While on his way home on the same day of the purchase he was seen with the pistol, and when about three-quarters of a mile from his home he drew and fired off the same.

Under the authority of the following cases the above facts do not constitute an offense, unless the fact that the pistol was loaded or fired off while being carried home takes this case out of the rule

enunciated therein. *Waddell v. State*, 37 Tex. 354; *Christian v. State*, 37 Tex. 475; *Mangum v. State*, 15 Tex. Ct. App. 362.

Now, if A. finds or buys a pistol, he has the right to take the same home or to his place of business. Or if he carries his pistol to the shop to be repaired, or from the shop after it has been repaired, he does not violate the statute, whether the same be loaded or unloaded. Nor will the firing off of the pistol while on the way alter the case, the unlawful carrying of the pistol being the act denounced and punished by the statute.

The learned trial judge upon this subject charged the jury that: "It is not unlawful for a man to have or carry a pistol at his home, or to buy a pistol at a place away from his home and carry it on or about his person to his home, and in a town he might, if necessary, carry it to places where ammunition was sold for the purpose of fitting and obtaining ammunition for the pistol, and may buy and carry such ammunition as he wants; but when so carrying the pistol after the purchase and before reaching his home, to render such carrying lawful, the pistol must be empty; and if the pistol was unloaded when bought, he must not load it and carry it loaded; and if loaded when bought, he must not carry it in such condition, but must, if a cartridge pistol, take out the cartridges; or if it is a cap and ball pistol, he must at least take off the caps, and thus put it in such condition as that it cannot be used as a fire-arm by shooting without any further preparation."

We are of the opinion that the charge is not correct, and being excepted to at the time, the judgment is reversed and the case remanded.

Reversed and remanded.

NOTE BY THE REPORTER.—To the same effect, *State v. Gilbert*, 87 N. C. 527; s. c., 42 Am. Rep. 518. That case was followed in *State v. Harrison*, 98 N. C. 605, where the prisoner carried a pistol off his premises, for the purpose of exchanging it for an axe.

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JOHNSON V. STATE.

(19 Tex. Ct. App. 458.)

Criminal law — homicide — former conviction of assault — subsequent death.

A conviction of assault is not a bar to a subsequent indictment for murder where the victim subsequently dies from the effects of the assault.*

CONVICTION of manslaughter. The opinion states the case.

E. B. Randle, and *C. R. Breedlove*, for appellant.

J. H. Burts, assistant attorney-general, for State.

WILLSON, J. On August 10, 1884, the defendant cut John Davis with a knife. He was indicted for an assault with intent to murder said Davis by said act of cutting, and under said indictment was, on the 16th of October, 1884, convicted of an aggravated assault and battery, and fined \$25, which fine he paid. On November 12, 1884, John Davis died from the effect of said cutting, and thereafter the defendant was indicted for the murder of said John Davis by the same act of cutting and was convicted of manslaughter, from which conviction this appeal is prosecuted.

Defendant pleaded in bar of this prosecution his former conviction of an aggravated assault and battery, and the evidence fully sustained this plea, and showed that said assault and battery was the same transaction charged in the present indictment, except that at the time of said former conviction the death of Davis had not occurred. This special plea was properly submitted to the jury, and they found against it; and in this we think there was no error. Mr. Wharton says: "Where, after a conviction of assault, the assaulted person dies, the conviction of assault is no bar to a conviction for murder. The reason is that as at the time of the conviction of assault there could have been no conviction of the murder, the prosecution for the murder is not barred by the conviction of the assault." Whart. Cr. Pl. & Prac., § 476. Mr. Bishop says: "If after a battery and a conviction for it, the assailed person dies of his wounds, an indictment may be maintained for the homicide; not, it appears, because the battery is the less offense, but because

* To same effect, *State v. Littlefield* (70 Me. 452), 85 Am. Rep. 885.

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the blow which had not produced death is, when viewed in the light of its results, a thing different from the blow which had produced death." 1 Bish. Cr. Law, § 1059.

There never can be the crime of murder or manslaughter until the party assaulted dies; these crimes have no existence in fact or law till such death. It cannot therefore be said that one is tried for the same crime when he is tried for assault during the life and tried for murder or manslaughter after the death of the injured party. The death of the assaulted party creates a new crime. At the time the defendant was convicted of the assault and battery upon Davis, the court in which such conviction was had did not have jurisdiction of the offense here prosecuted, because said offense had not then been completed, and could not then have been prosecuted. Hence there is no conflict between the rule announced above and our statute and the decisions under that statute. Code Crim. Pro., art. 553. It is true that the greater offense always includes the lesser. And it is also true that where an offense consists of different degrees, and the defendant upon indictment or information is convicted or acquitted of any grade of such offense, such conviction or acquittal is a bar to any further prosecution of the offense. Code Crim. Pro., art. 553; *Givens v. State*, 6 Tex. 344; *Thomas v. State*, 40 Tex. 36; *Vestal v. State*, 3 Tex. Ct. App. 648; *White v. State*, 9 Tex. Ct. App. 390. But these rules do not apply where the higher grade of the offense has not been completed at the time of the conviction or acquittal of a lesser grade included within it, because such higher grade did not then exist. We think the court correctly instructed the jury upon this subject and the jury correctly found against the special plea of former conviction.

There are no exceptions in the record to the charge of the court, and no additional charges were requested by the defendant. We discover no material error in the charge given to the jury, and the evidence sustains the verdict. The judgment is affirmed.

Judgment affirmed.

Washington v. State.

WASHINGTON V. STATE.

(19 Tex. Ct. App. 521.)

Criminal law — murder — declarations — res gesta.

On a trial for murder it was shown that the deceased stated to the witnesses that he had just seen the defendant going down a slough, about one hundred yards distant, with a shot-gun. Three or four minutes later the sound of a gun was heard and going to the slough the witnesses found the deceased mortally wounded with buck shot, and he then stated to them that the defendant shot him. *Held*, that both declarations were competent as *res gesta*.*

CONVICTION of murder. The opinion states the case.

Oltoif & Harlan, for appellant.

J. H. Burts, assistant attorney-general, for State

HURT, J. This is a conviction for murder of the first degree, the punishment fixed by the verdict of the jury being death.

It is insisted that the court below erred in admitting in evidence, over objection of the defendant, a conversation between the deceased and the witness Jesse Dupree, as follows:

“He (witness) was at Jane Clarkson’s house on the evening deceased was killed, and that deceased came by said house on his way home from his (deceased’s) cow pen, and a short while before he was killed, and told witness that the defendant, Wash. Washington, wanted him (witness) to come to his (defendant’s) house on the next morning and write him (defendant) a letter; and in reply to said message from defendant, as above related, witness replied that he could not go on the next morning, but would go on that night; whereupon deceased replied that it was no use to go on that night, as he (deceased) had seen the defendant going down the slough with a shot-gun over his shoulder.”

The objection urged to this testimony, as appears from the bill of exceptions, is that the same was hearsay, irrelevant and not a part of the *res gesta*.

Another witness for the State, Jane Clarkson, testified to substantially the same facts, over objection, and the question as to the

* See *Kirby v. Com.* (77 Va. 681), 46 Am. Rep. 747; note, 37 Am. Rep. 83.

admissibility and materiality of this evidence is here presented by bills of exceptions duly saved.

It was in evidence, that a short time after this conversation occurred, a shot was fired in the direction of the slough from the witness Jane Clarkson's house ; that when the witnesses went to the place where the shot was fired they found the deceased lying just in the edge of the water of the slough, on the road between the house of Jane Clarkson and the house where deceased lived ; that deceased was shot with ten or more buck shot. It will be seen from this statement that the evidence objected to tended to show that the defendant was at or near the place of the homicide, and that he had the opportunity and means of killing the deceased at the time, and in the manner it is shown to have occurred.

To be more specific, that part of the conversation objected to is what deceased said about defendant being seen by him going down the slough with a shot-gun. The distance from Clarkson's house to the point on the slough at which deceased was killed is about one hundred yards. Immediately after the conversation between the witnesses and deceased, which took place at Jane Clarkson's house, he (deceased) left going in the direction of the slough on horseback. This conversation must have occurred within three or four minutes of the time of the homicide, and as we have seen, within about one hundred yards of the place of the killing.

Was the supposed objectionable evidence *res gestæ* ? If so, it was admissible. If not, under the facts of this case, conceding the testimony to be hearsay and tending to criminate, must the judgment be reversed because of its reception ?

Was the evidence *res gestæ* ? We think so. And believing the evidence admissible because constituting what is known as part of the *res gestæ*, there was no error in its admission.

From the third bill of exceptions it appears that the State proved, over the objection of defendant, that Jesse Dupree, Lloyd Brown and Albert Clarkson heard the gun fire and the outcry of deceased, and that they ran to him immediately after the gun fired. Upon reaching deceased they asked him who shot him, whereupon deceased replied " Wash. Washington shot me." Defendant objected because this answer of deceased came within the rule of dying declarations, and that the State had no predicate for the reception of dying declarations. Beyond any sort of question, this answer of deceased was strictly competent as *res gestæ*.

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[Minor matter omitted.]

We find no error in the judgment and it is therefore affirmed.

Judgment affirmed.

WEAVER V. STATE.

(19 Tex. Ct. App. 547.)

Criminal law — homicide — to prevent felony.

The defendant had been sent by railway managers to guard the track and arrest parties putting obstructions on it, with the promise of a reward for the arrest and conviction of such parties or for the killing of them while attempting to wreck a train. He shot and killed the deceased while he was in the act of putting an obstruction on the track, but at a time when no train was due. The act of obstruction was a statutory felony. *Held*, that the defendant's act was murder.

CONVICTION of murder. The opinion states the facts.

Robertson & Williams and Makemson & Price, for appellant.

J. H. Burts, assistant attorney-general, for State.

WHITE, P. J. This appeal is from a judgment of conviction for murder of the first degree, life imprisonment in the penitentiary being the punishment assessed.

[Minor questions omitted.]

With regard to its merits the whole case may be briefly summed up for appellant thus: If appellant killed deceased, it is claimed that then he was justifiable in doing so, because at the time of the homicide the deceased was in the act of placing, or had in fact already placed, an obstruction upon the track of the Austin & North-western railroad, with intent to wreck the train and thereby endanger the lives of persons upon said train. Or if not justifiable then that appellant's offense in killing deceased could not amount in law to a higher grade of crime than manslaughter. We will premise the discussion of these theories by stating, that under our statute is made a felony to willfully place an obstruction endangering human life upon a railroad track, and if human life is lost by such unlawful act the crime becomes murder. Penal Code, art. 678.

Homicide is permitted by law when inflicted for the purpose of preventing the offense of murder, whether committed by the party about to be injured or by some person in his behalf; but the killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense. Penal Code, art. 570, and subd. 2. In such circumstances the killing is justifiable on the principle of necessary self-defense. The whole doctrine of self-defense rests upon the comprehensive principle of reasonable necessity, and apparent reasonable necessity is the whole law of defense. It is the right to do whatever apparently is reasonably necessary to be done in warding off or avoiding serious injury under the circumstances of the case. *Aldrich v. Wright*, 53 N. H. 398; s. c., 2 Green Crim. 307; s. c., 16 Am. Rep. 339. It is a defensive and not an offensive act. 3 Tex. Ct. App. 581; 6 Tex. Ct. App. 191; 7 Tex. Ct. App. 269, 486; 8 Tex. Ct. App. 129. It is founded on the law of nature and is not nor can be superseded by any law of society. "Where murder or any other known felony is attempted upon the person of another, the party assaulted may repel force by force, and his servant attending upon him, or any other person present, may interpose for preventing the mischief; and if death ensue, the party so interfering will be justified." Whart. Hom. (2d ed.), § 532. This perfect right of defense which attaches to the person extends also to the protection of his habitation or "castle," 1 Bish. Cr. L. (7th ed.), § 860; *Richardson v. State*, 7 Tex. Ct. App. 486, and under certain restrictions even to the defense of corporeal personal property. In this latter case the restrictions are, that "all other means must be resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack; and any person interfering in such case in behalf of the party about to be injured is not justifiable in killing the aggressor unless the life or person of the injured party is in peril by reason of such attack upon his property." Penal Code, art. 572. "Every other effort in his power must have been made by the possessor (and *a fortiori* by the person acting in his behalf) to repel the aggression before he will be justified in killing." Penal Code, art. 575, subd. 4.

Where a felony is threatened the party may repel it, whether levelled at himself or others; "but the force of defense must be proportioned to the force of the attack. It is but reasonable that

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the kind and amount of defense should be measurably proportioned to the amount and kind of danger." "A *bona fide* belief by the defendant that a felony is in process of commission which can only be arrested by the death of the supposed felon makes the killing excusable homicide." Whart. Hom., § 533; Desty Am. Crim. Law, §§ 125*d*, 126*d*.

But "to justify the defensive destruction of human life the danger must be not problematical and remote but evident and immediate." *Aldrich v. Wright, supra*. "The attempt must not be merely suspected but (reasonably) apparent; the danger must be (apparently) imminent, and the opposing force or resistance must be necessary to avert the danger or defeat the attempt." 3 Greenl. Ev. (13th ed.), § 115; Desty Am. Crim. Law, § 126*d*. "The law holds the life of man in the highest regard. And only in extreme instances of wrong-doing, and impelled by extreme necessity, can another take it innocently away. Therefore when in general a person is in the commission of any mischief, whether civil or criminal, no other person opposing, however lawfully, is entitled to proceed in such opposition to the taking of his life. But to this rule there are exceptions, of which the most prominent one relates to felony. Anciently the punishment of felony was death, from which reason, or from some other not appearing, it became established doctrine both in England and our States that one may oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon's existence." 1 Bish. Crim. Law, § 849.

It seems however that the right to take life does not extend to nor authorize the killing of persons attempting secret felonies not accompanied with force. Whart. Hom., § 539. In *Pond's* case, 8 Mich. 150, the doctrine is thus stated, viz.: "It is held to be the duty of every man who sees a felony attempted by violence to prevent it if possible, and in the performance of this duty, which is an active one, there is a legal right to use all legal means to make the resistance effectual. Where a felonious act is not of a violent or forcible character, as in picking pockets and crimes partaking of fraud rather than force, there is no necessity and therefore no justification for homicide, unless possibly in some exceptional cases. The rule extends only to cases of felony, and in these it is lawful to resist force by force. * * * Life may not properly be taken under this rule where the evil may be prevented by other means within the

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power of the person who interferes against the felon. Reasonable apprehension however is sufficient here precisely as in all other cases." A killing is not excusable if the felony resisted, though most atrocious, could be prevented by less violent action, for as above stated, the right of resistance depends upon the necessity of the case, and the danger to be averted must be apparently immediate, pressing, imminent and unavoidable. The necessities of self-defense are limited to the immediate resistance of aggression, and the apprehension must have been excited by an actual assault. Desty Crim. L., § 125*l*. Mr. Bishop says: "Though it is lawful for one to oppose another who is committing a felony, even to the taking of his life, yet if there is no obstacle to his arrest, the shooting of him in the felonious act, instead of having him arrested, is a felonious homicide." 1 Bish. Crim. L., § 843; Whart. Hom., § 536; Desty Am. Crim. L., §§ 125*d*, 126*d*.

One in defense of his own or another's property must not kill the aggressor until all other means have been resorted to; he must find his redress in the courts. "If the wrongful act is proceeding to a felony on the property, he may then kill the doer to prevent the felony, if there is no other way; otherwise this extreme measure is not lawful. And the defense may be such and such only as necessity requires; of course within the limit which forbids the taking of life." 1 Bish. Cr. L., § 875. It is provided by our statute that "a peace-officer, or any other person, may without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an offense against the public peace." Code Crim. Proc., art. 226; *Staples v. State*, 14 Tex. Ct. App. 136.

These are the principles of law applicable to the facts of this case. Deducible from these principles are the following rules relative to a homicide claimed to be justifiable in defense of life or property, viz.:

1. To justify homicide in defense of one's own life or the life of another or others, it must be in necessary resistance to aggression apparently violent, immediate and imminent, toward the person about to be injured.

2. To justify homicide to prevent the perpetration of any other felony, the danger or felony intended must not be problematical or remote, but evident and immediate.

3. It is in no case, except as to habitation or castle, justifiable to kill in defense of one's own or the property of another, until every

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other means have been resorted to to prevent the injury or violence attempted.

4. In no case of felony or attempted felony is it lawful to take life where the party may be arrested and the felony thereby prevented.

5. Any person may arrest, with or without warrant, a party committing or who has committed a felony in his presence or within his view.

Now to apply these principles to the facts of the case. Concede that the deceased placed the obstruction upon the railroad track, that of itself, as we have seen, was a felony. Concede that he placed it there with the intent and for the purpose of endangering and causing the destruction of human life, in other words, to murder the innocent and unsuspecting officials and passengers who might be upon the next train. Still the fact that they would be killed or their lives endangered was problematical and remote so long as the train was not immediately approaching with apparent and unavoidable proximity to the obstruction. Suppose the object was to destroy only the property of the railroad company by throwing a freight train from the track and breaking up its cars, that result was equally as remote and problematical. In neither of these cases, as we have seen, could defendant justify his act in taking deceased's life, either for the felony already committed in placing the obstruction upon the track, or the felony of murder or destruction of property, it was supposed or presumed he intended to commit.

Again deceased was unarmed, defendant armed with a double-barrelled shot-gun. He had been sent there purposely to guard the railroad track, to arrest and prevent parties whom he might see placing obstructions on the track, and he assumed the duty under promise of a reward from the management of the road of \$200, to be paid for any such arrest, "to be paid whether the guilty parties be arrested and convicted, or be shot and killed while in the act of attempting to wreck a train."

Defendant went, we presume, to arrest or kill such parties. He is presumed to have known that the law authorized and made it his duty to arrest the parties. He had the same authority as any peace officer would have had. He had the time, he had the means, he had the authority not only of his employers but of the law; it was his duty to arrest. The portions of the charge of the learned trial judge to the jury which are earnestly complained of by counsel for appellant, are as follows :

“12. The act of willfully placing an obstruction upon the track of a railway, endangering human life thereby, is a felony ; and under the law any person may, without warrant, arrest the offender when the offense is committed within view of the person making such arrest ; but under the law neither officer nor other person can lawfully take the life of such offender, whose arrest may be so made or sought to be made, unless the officer or other person making the arrest has just ground to fear his own life will be taken, or that he will suffer great bodily harm; in which cases life may be taken.

“13. If therefore the jury find from the testimony that the deceased placed such obstacle upon the track of the Austin and Northwestern railway, endangering human life, in view of defendant, and that defendant sought to arrest deceased, and that deceased resisted, or so acted as to give the defendant just ground to fear his own life or great bodily harm, and that in such circumstances the defendant shot and killed deceased, then such killing is by the law excused, and the jury should acquit.

“If however in such attempt by defendant to arrest deceased, and if there be in evidence nothing showing, or tending to show, that the deceased so acted as to give defendant just or apparent ground of fear of his life, or of great bodily harm, and if the jury find from the testimony, beyond a reasonable doubt, that in such circumstances the defendant shot and killed deceased, then such killing would be unlawful, even if the killing was made in attempting the arrest of the deceased ; and if the killing was intentionally and deliberately done, the act would be murder.

“The mere placing of the stone upon the railway track, if done, would not excuse or justify the killing, if proved.”

To this charge appellant at the time specially excepted.

It is claimed that these instructions are erroneous, because there was no evidence showing or tending to show that appellant killed deceased while resisting his attempted arrest. He has no right to complain. It was but charity, if not a right to which he was entitled, to give him the benefit of a charge upon the only hypothesis upon which the law would justify his taking the life of the deceased. The instructions are in entire harmony with the rules of law as above announced.

We have given this case our most earnest and thorough consideration. There is no manslaughter involved in it. It is solely a case

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of murder or justifiable homicide. These issues were fairly submitted to the jury. They have found that it was murder of the first degree — a murder the express malice of which is evidenced by a lying in wait. The learned judge who heard the testimony, and was in better position to pass upon its weight and sufficiency than we are, overruled defendant's motion for a new trial. As presented in this record, we think it amply supports the verdict and judgment, and being unable to see that any error was committed at the trial, the judgment is affirmed.

Judgment affirmed.

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(19 Tex. Ct. App. 635.)

Pardon — conditional — effect on competency of witness.

A pardon subject to revocation by the governor whenever he shall determine that the convict has violated any of the criminal laws of the State does not restore his competency as a witness. (*See note, p. 400.*)

CONVICTION of burglary. The opinion states the case.

Fly, Davidson & Davidson, for appellant.

J. H. Burts, assistant attorney-general, and *Ponton & Fly*, for State.

WHITE, P. J. With regard to the effect and character of the pardon granted by the governor to the witness Hester, I cannot concur in the views expressed in Judge HURT's opinion. The conditions annexed to the pardon were that it should be "subject to revocation by the governor of Texas whenever it shall be determined by the said governor that he has violated any of the criminal laws of the State." No one will deny that the power to grant pardons conferred by the Constitution (Const., art. IV, § 11) carries with it the power to make the pardon full, partial or conditional. Such has always been the law, as we understand it, both in England and America. 1 Bish. Crim. L., § 914. Another rule which we think may be considered sound in reason and law, is that "the governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law, and it is binding upon

the grantee. *Flavell's case*, 8 Watts & Serg. 197; *Hunt, Ex parte*, 10 Ark. 284; *Ex parte Wells*, 18 How. 307.

A full pardon absolves the party from all the legal consequences of his crime, and amongst the disabilities removed is his incapacity to be a witness. Only a full pardon has this effect. 1 Bish. Crim. L., § 917. The effect of a full pardon "is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former as to give him a new credit and capacity." *Hunnicutt v. State*, 18 Tex. Ct. App. 499, citing 4 Bl Com. 402; 1 Greenl. Ev., § 377; *People v. Pease*, 3 Johns. Cases, 333; *Wood v. Fitzgerald*, 3 Oreg. 568; *In re Deming*, 10 Johns. Cases, 232; *State v. Baptiste*, 26 La. Ann. 136; *Ex parte Hunt*, 5 Eng. (Ark.) 284; *Hester v. Comm.*, 85 Penn. St. 154; 2 Hawk. P. C., 547, and cases there cited; 1 Phill. Ev. 21; 1 Gilb. Ev. 259.

A full pardon is a remission of guilt; it releases the offense and obliterates it in legal contemplation. 1 Bish. Cr. L., § 898; *Osborn v. United States*, 91 U. S., 474. Hawkins says: "I take it to be settled at this day that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy of all other consequences of his crime that he may not only have an action for scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him, as it were a new man and blots out his offense." 2 Hawk. P. C., p. 547, § 48; *Hunnicutt v. State*, 18 Tex. Ct. App. 499; *Knote v. United States*, 95 U. S. 153; *United States v. Athens*, 2 Abb. 149. A full pardon blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. *Ex parte Garland*, 4 Wall. (U. S.) 333.

From these authorities it becomes evident, that before a convict's competency as a witness is restored he must have been absolved from all the consequences of his crime and its punishment. There must have been a remission of his guilt; he must, as it were, have been made a new man with new capacity and credit, whose offense has been blotted out. Lord Coke says, "a pardon is a work of mercy whereby the king forgives crimes. It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend. If the felon

does not perform the condition of the pardon, it will be altogether void and he may be brought to the bar and remanded to suffer the punishment to which he was originally sentenced." Church Hab. Corp., § 458.

Mr. Bishop says, "a conditional pardon may be on condition either precedent or subsequent; if precedent — that is, if by its terms some event is to transpire before it takes effect — its operation is deferred until the event occurs. If the condition is subsequent, the pardon goes into effect immediately, yet becomes void whenever the condition is broken." 1 Bish. Cr. L., § 914. We do not dispute this latter proposition, but we think Judge HURT misconstrues the extent to which a pardon upon subsequent condition is allowed to go into effect immediately. Mr. Bishop, in support of his text, cites two cases, only one of which has been accessible to us. In that case (*Flavell's case*, 8 Watts & Serg. 197), the convict had been pardoned "on express condition that he be taken direct from the penitentiary on board the vessel which is to convey him out of the country, and there remain until the vessel put to sea." On *habeas corpus* the court discharged the prisoner under the pardon, holding that where a condition is annexed to a pardon "it lies upon the grantee to perform the condition. If he does not, in case of a condition precedent the pardon does not take effect; in case of a condition subsequent, such as this before us (if the condition is not performed), the pardon becomes null, and if the condition is not performed, the original sentence remains in full vigor and may be carried into effect." The case does not bear out the construction placed upon the text.

If the doctrine announced by Judge HURT be correct, then there is absolutely no difference whatever between a full pardon and one upon a subsequent condition. If it goes into effect immediately so as to restore him to all his rights, the convict has all he could reasonably desire, and may well refuse to pay any regard to the subsequent condition, because it would not concern him materially. It is however not the time when a pardon commences to operate which determines its character and effect. Its character is ascertained by the terms in which it is expressed and the conditions annexed to it.

To illustrate: In the case of *Ex parte Wells*, 18 How. 307, Wells was convicted for murder and sentenced to death; the president of the United States granted him a conditional pardon, the condition

being "that he should be imprisoned during his natural life." It was held by the Supreme Court that the pardon and subsequent conditions were valid. Now then, here we have a party pardoned with subsequent conditions attached to the pardon; the pardon went into effect immediately. Will any one contend that because such pardon took effect immediately it thereby rehabilitated Wells and restored all his rights of citizenship? The Supreme Court expressly decided that it did not restore his liberty, and we feel confident that no court would hold that it restored his competency as a witness so long as he was suffering imprisonment as a convicted felon for the crime he originally committed. A mere remission or commutation of punishment cannot restore a felon's competency as a witness. *Perkins v. Stephens*, 24 Pick. 277. "It is only a full pardon of the offense which can wipe away the infamy of the conviction and restore the convict to his civil rights. * * * There is but one mode now in use of restoring the competency of a witness, and that is by pardon under the great seal of the State, which when fully exercised is an effectual mode of restoring the competency of a witness. It must be fully exercised to produce this effect; for if the punishment only be pardoned or remitted, it will not restore the competency and does not remove the blemish of character. There must be a free and full pardon of the offense before these can be restored and removed. *Perkins v. Stephens*, 24 Pick. 277.

Is the pardon before us in this case a full pardon, or one which restores Hester to all his rights of citizenship? Let us apply the tests. Is his crime blotted out? Is his guilt remitted? Is he made a new man? Is he given new credit and capacity to the extent that he is the equal before the law of all his fellow-citizens in all his and their civil and criminal rights? *Knote v. United States*, 95 U. S. 153. If the conditions are valid, not one of these can be affirmatively answered. His crime is not blotted out, because he can still be punished for it "whenever it shall be determined by the governor that he has violated any of the criminal laws of the State." His guilt is not remitted, because the governor still holds him subject to punishment for it if he determines that he has violated any of the criminal laws of the State. He is not made a new man, because liability to the same old punishment still attaches to him. He is not the equal before the law of the rest of his fellow-citizens. Why? Let us see. Suppose Hester and any one or

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more of his fellow-citizens should combine and unite together in committing a simple assault. His fellow-citizens, co-principals and co-conspirators, could only be punished by a fine of not more than \$25. Hester, not more guilty than they, is not alone fined \$25, but he is also seized by order of the governor and incarcerated in the penitentiary, because by committing said assault he has violated a criminal law of the State. Under the conditions of this pardon the taint of his original crime clings to him like the shirt of Nessus as long as life lasts, and its punishment, like the sword of Damocles, is kept continually suspended over him. Such a pardon cannot restore a convict's competency as a witness. He is simply a ticket-of-leave man—with unrestrained liberty so long as he behaves himself, or so long as the governor may not determine that he has committed some misdemeanor.

I am of opinion the witness Hester was wholly incompetent to testify, because he is a convicted felon whose disabilities have not been removed, and that the court erred in permitting him to testify over objection of defendant. I concur in the other grounds stated in the opinion of Judge HURT for a reversal of the judgment.

WILLSON, J. "A pardon is a remission of guilt." 1 Bish. Cr. Law, § 898. It is full, partial, or conditional. Full, when it freely and unconditionally absolves the party from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided. 1 Bish. Cr. Law, § 916. Partial, where it remits only a portion of the punishment, or absolves from only a portion of the legal consequences of the crime. Conditional, where it does not become operative until the grantee has performed some specified act, or where it becomes void when some specified event transpires. 1 Bish. Cr. Law, § 914.

In the case under consideration the pardon is clearly of this latter class. Its validity is made dependent upon the condition subsequent, that the grantee shall not violate any of the criminal laws of this State. This condition is neither impossible, criminal nor illegal, but is within the limit of approved conditions, and therefore valid. It must therefore go with and form a part of the grant of pardon, and hence the pardon is not a full but a conditional par-

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don. Such being its character, it cannot have the effect to restore the competency of the witness Hester. It is only a full pardon that could have this effect. 1 Bish. Cr. Law, § 917; Whart. Cr. Ev., § 365. I therefore concur in the opinion of Presiding Judge WHITE, that the witness Hester was incompetent to testify, and that because he was permitted to testify the judgment should be reversed and the cause remanded.

Reversed and remanded.

NOTE BY THE REPORTER.— HUNT, J., dissenting: "It appears from the record that one John Hester had been convicted of the theft of sheep of greater value than \$20. That he, upon said conviction, had been sentenced to five years' confinement in the penitentiary at hard labor. When offered as a witness, the record of his conviction and sentence being produced in evidence by defendant, counsel for defendant objected to his testifying because of said conviction, etc. Whereupon the State produced in evidence a pardon containing the following provisions: 'Subject to revocation by the governor of Texas whenever it shall be determined by said governor that he has violated any of the criminal laws of this State,' and again proposed the convict as a witness. The defendant objected upon the ground that this was a conditional pardon, and that such pardon did not restore him to his competency as a witness. The court overruled the objection and Hester was sworn as a witness for the State; to which the defendant objected, and reserved his bill of exceptions.

"An absolute pardon is one which frees the prisoner without any condition whatever. A conditional pardon is one to which a condition is annexed, performance of which is necessary to the validity of the pardon. 1 Bail. 283; 10 Ark. 284; 1 McCord, 176; 1 Park. Cr. Cases, 47. If the pardon be conditional the condition may be either precedent or subsequent; if precedent—that is, if by its terms some event is to transpire before it takes effect—its operation is deferred until the event occurs. But if the condition is subsequent, the pardon goes into operation immediately, yet becomes void whenever the condition is broken. 1 Bish. Cr. Law, 914.

"The effect of a full or absolute pardon is to absolve the party from all the legal consequences of his crime, and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided.

"Among the collateral consequences of conviction for felony is the incapacity to be a witness; this is restored by a full pardon. Mr. Bishop says however: "Yet only a full pardon has this effect," citing in support of this proposition, *Perkins v. Stevens*, 24 Pick. 277. Upon an examination of that case it will be found that there was not annexed to the pardon either a precedent or subsequent condition. In that case the governor remitted to McKenzie the residue of the punishment he was sentenced to endure in the State prison; this was the extent of the pardon. There was no intention on the part of the governor to pardon the offense. Unquestionably if there be a condition precedent an-

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nexed to a pardon the operation of the pardon is deferred until the condition is performed or the event has occurred. If however the condition is subsequent the pardon with all of its consequences goes into operation immediately, becoming void whenever the condition is broken. 1 Bish. Cr. Law, § 914. The effect therefore of a pardon with a subsequent condition is the same as a full unconditional pardon until the condition is broken. I am of the opinion that Hester was a competent witness, and that there was no error in overruling appellant's objections to him upon the ground of incompetency."

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CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

POLLARD V. SLAUGHTER.

(99 N. C. 72.)

Marriage — dower — devise in fee — executory devise over.

A will devised land to T. S. and his lawful heirs begotten of his body, and in case of his dying without such, “to return to J. and C. P. or their lawful heirs begotten of their body.” T. S. dying without having had issue, *held*, that his widow was still entitled to dower.

ACTION to recover land. The head-note states the case. The plaintiff had judgment below.

Fuller & Snow, D. G. Fowle and E. C. Smith, for plaintiff.

Battle & Mordecai, for defendant.

ASHE, J. This was an action to recover land, tried before AVERY, J., at the February term, 1884, of Wake Superior Court.

A jury trial was waived and the action submitted to the decision of the court. The plaintiff claimed the land in controversy under the will of Berry Surles, which said will is as follows, to-wit:

“First, I give and bequeath to John Pollard one negro girl named Jane, to him and his lawful heirs begotten of his body; dying intestate, such to return to Caswell Pollard and Thomas Slaughter, or their lawful heirs begotten of their bodies.

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"Then second, I give Caswell Pollard one negro girl by the name of Hannah, to him and his lawful heirs begotten of his body, dying without such, to return as above directed.

"Thirdly, I give to Thomas Slaughter one negro girl named Pat, to him and his lawful heirs begotten of his body, dying without such to return to John and Caswell Pollard, or their lawful heirs begotten of their body, and the balance of my land and negroes to be equally divided between John Pollard, Caswell Pollard and Thomas Slaughter, after paying all my just debts; with this exception, Buck; it is my desire that he be sold to a speculator; and it is my desire that all of my stock of all kinds to be sold and equally divided between them as above stated; also my money and notes to be divided in the manner above stated, equally, my three sons which is named in this will. It is my desire if they all should die without such heirs, to return to my brothers and sisters or their lawful heirs."

It was admitted that John Pollard, one of the devisees, died leaving no issue of his body, and his interest in said land was divided between Caswell Pollard and Thomas Slaughter, by a decree of the Superior Court of Wake county, and that Thomas Slaughter, on the ——— day of ———, 18—, died, leaving no issue of his body, but leaving a widow, the defendant in this action.

The defendant in her defense to the plaintiff's action set up as a counter-claim that she was entitled to dower in the land in controversy, as the widow of Thomas Slaughter, who was seised thereof at his death of an estate of which her issue might have been heirs, and demanded judgment that she have dower allotted to her in the same.

The court rendered judgment in behalf of the plaintiff, and the defendant appealed.

The case was argued in this court at considerable length and with great ability by counsel on both sides, and the only question mooted by counsel was whether the plaintiff was entitled to dower in the lands described in the complaint.

Both parties claim under the will of Berry Surles, and the question in controversy depends upon the construction of the will. The plaintiff contends that the proper construction of the will is that the same conditions and limitations attached by the testator to the personal estate apply as well to the devises, and that upon the death of either John Pollard, Caswell Pollard or Slaughter without

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heirs of his body at the time of his death his share passed to the survivors, and upon the death of another of the devisees without heirs of his body, his share went to the last survivor with the accrued interest of him who first died, because the testator directed that upon the death of all the named devisees without such issue, the whole estate should go over to his brothers and sisters, and that when either one of the devisees died without having issue, his estate at once ceased by the limitations to the survivor, and the estate ceasing, all the incidents of the estate, such as dower, ceased with it.

The defendant insisted that conceding the construction contended for by the plaintiff to be correct, by the will and the operations of the act of 1784 (Code, § 2180), a fee simple estate was vested in each of the devisees, to be defeated by the happening of the contingency of dying without heirs of the body, and when one of them died without having had issue, leaving a widow, she would be entitled to dower, because her husband had been seised of an estate of inheritance in the law during the coverture, to which any child she might have had by him would have been heir. If the construction contended for by the plaintiff is not the proper interpretation of the will, then the only other construction of which it is susceptible is that the devise in the will vested in each of the devisees an absolute estate in fee simple, without any of the conditions or limitations annexed to the bequests of personalty.

But in the view we take of the case it is needless to decide which is the proper construction, and we therefore express no opinion upon that point, for whichever way it is taken, in our opinion the defendant is entitled to dower.

From the leading and most reliable authorities upon the subject of a widow's right of dower, the criterion for determining in any case whether she is entitled to dower, is whether her husband was seised of such an estate during the coverture, as any child she might have by him could by possibility take it by descent. Littleton in 1 Thomas Coke, § 53, p. 450, lays down the rule to be, "in any case where a woman takes a husband seised of such an estate in tenements, etc., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower—not otherwise."

The same rule is laid down by Blackstone, who adds that if the

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land abides in him (the husband) for the interval of but a single moment, it seems that the wife shall be endowed. 2 Bl. Com. 132. To the same effect are the opinions of Scribner in his work on Dower, and Washburn on Real Property.

Perhaps there is no subject in the law which has given rise to a greater diversity of opinion and elicited more learned disquisitions than the question involved in this case, whether the widow of one to whom by executory devise an estate is given in fee simple, but if he should die without issue, then over to another in fee, is entitled to dower.

The first and leading English adjudication on this subject was the case of *Buckworth v. Thirkell*, 3 Bos. & Pull. 652, note. The facts in that case were substantially that an estate by executory devise was given to M. B. in fee simple in the event she should attain the age of twenty-one, or her marriage. Upon the happening of either event she was to take an estate in fee simple. But in case she should die before attaining the age of twenty-one and without having issue, in that event the estate was limited over. She married one Hansard, had a child by him, the child died, and then she died under the age of twenty-one, without leaving issue. The case was twice argued in the King's Bench, and after due consideration, it was held that the husband of M. B. was entitled to his curtesy. The principle there decided after such careful consideration was, that the determination of an estate by operation of an executory devise, does not defeat the right of the husband to be tenant by the curtesy, nor the widow of her right of dower. For the same principle applies as well to the one estate as to the other, only in the case of curtesy, the wife must be actually seised, and a child born capable of inheriting the estate.

This was deemed a leading case in England upon the subject involved, and was followed by the case of *Moody v. King*, 2 Bing. 447 — where there was a devise to A. and his heirs, but if he should have no issue, the estate devised was, on his decease, to become the property of the heirs at law. A. died without issue, and it was held upon the principle laid down in *Buckworth v. Thirkell*, *supra*, that the wife was entitled to dower, and was also followed by *Doe v. Timins*, 1 Barn. & Ald. 549; *Goodmorst v. Goodmorst*, 3 Prest. Abs. 392.

In *Moody v. King*, *supra*, BEST, C. J., says, that though the opinion of Lord MANSFIELD, in the case of *Buckworth v. Thirkell*,

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has been questioned, it has been the settled law in England, and cites in that connection Littleton, § 52.

In the United States the decision announced in that case has been generally approved and adopted. In a South Carolina case, *Milledge v. Lamar*, 4 Dess. 637, where the devise was to Thomas and his heirs, but should the said Thomas die without any heir of his body begotten, then over, it was held that upon Thomas dying without issue, his wife was entitled to dower and the court spoke with approbation of *Buckworth v. Thirkell* and *Moody v. King*, and cited Littleton, § 52, in support of the principle that the widow is entitled to dower when any child she might have would take the estate by descent.

In Kentucky where there was a devise to A. and his heirs, but if he should die without heir, the estate should go to his sisters — and A. married and died without issue ; it was held, that his widow was entitled to dower, upon the ground that in all cases where the husband is seised of such an estate that the issue of the wife, if she had any, would inherit it, she was entitled to dower, though the estate is limited over, upon his dying without issue, and he does die without issue. 12 B. Monr. 65. And in Pennsylvania, by an executory devise, an estate was given to two sons, A. and B., their heirs and assigns, but if either should die without having lawful issue living at his death, his estate should vest in his surviving brother and his sister; it was held that the widow of one of those sons, who had died without issue while the other son was living, was entitled to dower, and it was awarded to her. *Evans v. Evans*, 9 Penn. 190.

The same doctrine is maintained by the Court of Appeals in Virginia in the case of *Taliaferro v. Barnwell*, 4 Call. 321, and by the following text-writers with unqualified approval: 2 Minor's Institutes, marg. page 116 ; Scribner on Dower, 306 ; 1 Wash. Real Prop. 248 ; 1 Jarm. Wills, 668, and 2 Crabb Real Prop. 167. Against this array of authorities the plaintiff's counsel relied, for the support of his position that the defendant was not entitled to dower, upon Scribner Dower, Park Dower, 11 Law Lib., marg. page 166 ; *Sumner v. Partridge*, 2 Atk. 47 ; Coke upon Litt., § 241, note "A," Butler ; *Adams v. Beekman*, 1 Paige, 634 ; 4 Kent Com. 49 ; *Weller v. Weller*, 28 Barb. 588. But the principal authorities relied upon are Kent Com., Park Dower, and Butler's Note to Coke.

Chancellor KENT, on the page referred to by defendant's counsel,

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after stating, as an undisputed proposition, that dower will be defeated by the operation of collateral limitations, proceeds to say: "The estate of the husband is, in a more emphatic degree, overreached and defeated by the taking effect of the limitations, than in the case of collateral limitations, and the ablest writers on property law are evidently against the authority of the case of *Buckworth v. Thirkell*, and against the dowress, where the fee of the husband is determined by executory devise, or shifting use," and the authorities referred to sustain his position in the note, are Butler's note, *supra*, Sugden Powers, 333 ; 3 Preston Abstracts of Titles, 372, and Park Dower. Park in his treatise does disapprove of the judgment of Lord MANSFIELD in *Buckworth v. Thirkell*, and he has made a very long, elaborate and learned argument against his lordship's decision in that case, but he does not seem to be very well supported by the authorities cited to sustain his position — for instance, he takes the case of *Sumner v. Partridge*, 2 Atk. 46, as an authority for his position.

That was a devise to A. and his heirs, and if she died before her husband, he to have £20 a year for life, remainder to her children ; it was held the husband of A. was not entitled to curtesy ; and it was properly decided upon all the authorities, for the children of A. did not take by descent, but by purchase ; curtesy necessarily arises out of an inheritance. He refers to Sugden and Preston as sustaining his position, and says Mr. Sugden, in his valuable treatise on Powers, has intimated his opinion that the case of *Buckworth v. Thirkell* was not rightly decided, and adds, "such appears to have been formerly the opinion of another conveyancer of great eminence" (meaning Mr. Preston). But he admits in the later writings of that gentleman there appears to be an inclination to retract his former opinion. To show how much weight should be attached to Mr. Park's comments upon the decision of Lord MANSFIELD, in the conclusion of his criticism, he suggests, that the reader should receive his observation with caution, saying, "until the law of *Buckworth v. Thirkell* (if it be a decision for the point understood), shall be reconsidered before a competent jurisdiction, it cannot be considered in practice but that a title of dower does exist under the given circumstances, and the remarks of the writer, although not standing alone, can have no other influence, than as they may tend to show that there is a possibility that that decision may not be followed." There is a clear admission that the practice, and therefore the weight

of authority is in accordance with the decision of Lord MANSFIELD, and this is the main authority upon which Chancellor KENT's opinion was based.

The next authority relied upon by the defendant's counsel was Butler's note to Coke, with a very high and learned encomium upon Mr. Butler. His note was cited as containing a decided condemnation of the decision in *Buckworth v. Thirkell*. But Mr. Butler does not do any thing of the kind. In his note he cites Fitzherbert's *Natura Brevium*, 159; *Tlone v. Ven*, 1 Roll. Abr. 676, and one or two other authorities, and says the principle deduced from them is, "that when the fee in its original creation is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that when the fee is originally devised in words imparting a fee simple or fee-tail absolute and unconditional, but by subsequent words is made determinable upon some particular event, then, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases. But a different doctrine as to cases of the latter description seems to have been laid down in the case of *Buckworth v. Thirkell*, determined in the King's Bench. He then proceeds to state the facts in that case, and the unanimous opinion of the court that the husband was entitled to his curtesy, and he concludes his observations by referring to several authorities, in which much useful learning on the subject of his note may be found, but there is not a word of condemnation or even disapproval of the decision. His own opinion is only to be inferred from the context.

GIBSON, C. J., of the Supreme Court of Pennsylvania, in *Evans v. Evans, supra*, in commenting upon their note, says, "I cannot apprehend the reason of his (Mr. Butler's) distinction in the note to Coke Litt. 241, between a fee limited to continue to a particular person at its creation, which curtesy or dower may survive, and the devise of a fee simple, or a fee-tail, absolute or conditional, which by subsequent words is made determinable upon some particular event, at the happening of which curtesy or dower will cease. In *Doe v. Hutten*, Lord ALVANLY spoke doubtingly of it; and without absolutely dissenting from it, refused to give it his approbation. He says, "the system of estates at common law is a complicated

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and artificial one; but still is a system complete in all its parts and consistent with technical reason. But how to reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him to show; and he has not done it."

The plaintiff's counsel, besides the cases cited by him and heretofore commented upon, relied upon the decision in *Adams v. Burkman*, 1 Paige, 31, and *Weller v. Weller*, 28 Barb. 588. In the former case the widow was held not entitled to dower, because her children did not take as heirs of their father, but as contingent legatees of the proceeds of the sale of land converted into money—and in the latter case the court followed the opinion of Chancellor KENT, and was one of the very few authorities to be found in support of the plaintiff's position.

From all the authorities to which we have had access we are of opinion the defendant is entitled to dower in the land in controversy.

We have not overlooked the fact that the defendant has no right, as widow, although entitled to dower, to hold the possession of the land against the plaintiff before the assignment of her dower, but that point was not taken by the plaintiff's counsel in his argument before us, and from the known astuteness and acumen of the learned counsel, we must assume that it did not escape his attention, but that it was his purpose, in order to prevent another proceeding against his client "*in forma pauperis*," to have the whole matter in controversy determined in this action. This can be done under the equitable jurisdiction of the Superior Court over the subject of dower, which we do not think has been taken away by giving cognizance of such matter to the clerk of that court.

In *Campbell v. Murphy*, 2 Jones Eq. 357, PEARSON, C. J., says, the jurisdiction of the courts of equity over the subject of dower is well established; and in *Jones v. Gerock*, 6 Jones Eq. 190, a bill in equity to have dower assigned was entertained, and a decree for dower rendered—but the application to the equity jurisdiction of the courts should, as a general rule, contain some equitable element. But inasmuch as in this case the parties are before the court, and a determination of the whole matter in controversy will prevent a circuitry of actions, which it is the policy of the Code to encourage, we have therefore deemed it proper to take cognizance, in this case, of the defendant's equitable right to dower and decide the case

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upon its true merits. The judgment of the Superior Court must therefore be reversed, and this opinion certified to that court that proper proceedings may be had to assign to the defendant her dower in the land described in the complaint.

Error.

Judgment reversed.

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(22 N. C. 29.)

Will — devise for life — remainder — remainderman dying in life-time of tenant.

On devise to M. for life, remainder to G. in fee, G. dying during the life-time of M., the estate descends to M.'s heirs.

ACTION for recovery of land. The opinion states the facts. The plaintiff had judgment below.

J. A. Forney and W. P. Bynum, for plaintiffs.

M. H. Justice and Hoke & Hoke, for defendants.

ASHE, J. George Hay, the owner of the fee simple of the land in controversy, devised it to his son George Hay, Jr., who occupied it until his death in 1842.

George Hay, Sr., had three children, James, Sarah and George, Jr. James it is supposed died many years ago without issue. Sarah married one Suttle, and had two children, Sarah and Mary, who are the four plaintiffs in this action.

George Hay, Jr., married Martha Wesson, who before her marriage had two illegitimate children, George Wesson and Mary Wesson, and none after marriage. George Hay, Jr., left a will in which he devised the land to his wife Martha for life, and after her death to his son George Wesson in fee. George Wesson died during the continuance of the life estate of his mother, Martha.

The plaintiffs claim the land as the heirs of George Hay, Jr., the person last actually seised of the land, contending that as George Wesson died during the continuance of the particular estate, and consequently never having had actual seisin, the land descended upon his death to the heirs of George Hay, Jr., who created the

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remainder in George Wesson, and was the person last actually seised of the land in fee simple.

The defendants claim under the deeds of conveyance from Martha Webb, the plaintiff, and Mary Suttle, the illegitimate daughter of Martha Suttle, the wife of George Hay and sister of George Wesson.

We deem it unnecessary to inquire whether the defendants had any title to the land. The plaintiffs must recover upon the strength of their own title, and we therefore proceed to address ourselves to the question whether the plaintiffs have title.

This question is not free from difficulty, but the complexity of the subject is mainly attributed to confounding the estates of reversions and remainders, which though having some resemblance to each other are quite distinguishable. Blackstone defines a remainder to be an estate limited to take effect and be enjoyed after another estate is determined; and it not only requires a particular estate to support it, but it must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. 2 Bl. Com. 163–168. The same author defines a reversion to be “the residue of an estate left in the grant, to commence in possession after the determination of some particular estate, granted out by him. A reversion is therefore not created by deed or writing, but arises from construction of law. A remainder can never be limited, unless either by deed or devise.” 2 Bl. Com. 175–6.

There is a marked difference in some of their incidents, notably in the liability for debts, and in the modes of descent. A remainderman was not liable for the debts of the grantor from whom he derived the estate, whilst a reversioner was bound to pay his ancestor's specialty debts, to the extent of the value of his reversion; and at common law a reversion descends like the old inheritance, of which indeed it is a part, in the same line therewith and keeping to the blood of the same first purchaser; whilst a remainder is a new estate, acquired by purchase, and passes into the line of a new purchaser, 2 Minor's Institutes, page 442, and this position is supported by Sir Wm. Blackstone, who lays down the doctrine, that “If one seised of a particular estate in fee, makes a lease for life with reversion to himself and heirs, this is properly a mere reversion, to which rent and fealty shall be incident, and which shall only descend to the heirs of his father's blood and not to his heirs general, as a remainder limited to him would do. 2 Bl. Com. 177.

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This seems to be a clear recognition of the doctrine, that when one owning the fee simple conveys it to one for life, remainder to another, that remainderman takes by purchase and becomes a new stirps of the inheritance; and we think that is the principle to be gathered from the authorities.

The counsel for the plaintiffs seems to have relied chiefly upon the decision of *Lawrence v. Pitt*, 1 Jones, 344, which was decided before the rule was changed, which required that "inheritance should lineally descend to the person who died last actually seised." But it is no authority for the position maintained by the defendants' counsel. The decision in that case was right.

There the person owning the estate in fee simple, and actually seised thereof, died leaving several children. His widow had dower assigned her in the parcel of land in controversy. Upon a partition among the children, the portion allotted to one of the daughters was covered by the dower. This daughter died before the widow, leaving a grandson who died without issue, and his father, the plaintiff, claimed the land under the provision of the rule of descent, Revised Statutes, chap. 38. It was held that he could not recover, for his son was not heir to his grandmother, because she was never actually seised of the estate in fee simple. The court held the rule to be, as to reversions and remainders expectant upon estates in freehold: "That unless something is done to intercept the descent, they pass when the particular estate falls in, to the person who can make himself heir of the original donor, who was seised in fee and created the particular estate, or if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder.

In laying down the rule the court omitted one very important element of the rule, to-wit, when the remainder or reversion comes by descent, as it was in that case, all the authorities agree that where there is an estate for life and remainder over, and the remainderman dies pending the particular estate, the estate descends to the donor who erected the particular estate, or to him who can make himself heir to such donor; but this is only when the remainder, like the reversion, comes by descent, as was the case in *Lawrence v. Pitt*; *supra*. It is true, remainders are created by deed or writing, but the estate is sometimes created so that what is called a remainder, is in effect only a reversion; as, for instance, when an estate is given to one for life, remainder to the right heirs of the

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grantor, 2 Wash. Real Property, 692; Burton Real Property, 51, and this must be the kind of remainder classed with reversions which go to the donor or to him who can make himself heir to him; but it cannot be that when the owner of the fee conveys it by deed or will to one for life and after his death to another in remainder in fee, that the estate could under any circumstances return to the donor, for he has parted with all his interest, and according to the rule as laid down by the court in *Lawrence v. Pitt*, the person who claims the estate must make himself heir to the remainderman who is the first purchaser of the remainder. Because being the first purchaser of the remainder, he thereby becomes a new stirps of the inheritance.

The distinction lies in acquiring the remainder or reversion by descent or purchase. In the one case it goes to the donor who created the estate, for it is the old inheritance, and in the other it goes to the heirs of the remainderman, because his estate was acquired by purchase, and falls into a new line of descent. This distinction is recognized by all the authorities. Washburn, in his work on Real Property, vol. 3, p. 13, uses this language: "As there can be no actual seisin and possession of a remainder or reversion dependent upon a particular estate of freehold, although the same will descend through a line of successive heirs until the estate vests in some one in possession, the rule of the common law seems to be this: If such remainder or reversion comes by descent from the donor of the particular estate who created the same, the person who claims it when it vests in possession must trace his descent from the donor who was last actually seised, irrespective of all who in the meantime may have been entitled to the same as heirs, the donor or creator of the particular estate being the stirps from which the descent of the one who is to take is to be traced. But it would be competent for any one to whom such right had descended to have sold it or divided it, whereby the grantee or devisee, as purchaser, would have constituted a new stirps, and he would take the estate, when it vested in possession, who could trace the descent to himself from such new stirps."

Judge Kent says, "It is a well settled rule of the common law, that if the person owning the remainder or reversion expectant upon the determination of a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he never had a seisin to render him the stock

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or terminus of an inheritance." The learned judge in this passage evidently has reference to such reversions and remainders as come by descent, for he proceeds to add as a part of the rule: "The estate will descend to the person who is heir to him who created the freehold estate, provided the remainder or reversion descends from him; or if the expectant estate had been purchased, then he must make himself heir to the first purchaser of such remainder or reversion, at the time when it comes into possession. The purchaser becomes a new stock of descent, and on his death, the estate passes directly to his heirs at law." With only slight variation in the phraseology, is the rule laid down by BEVERLY, J., in the case of *Vanderheyden v. Crandall*, 2 Den. 24, which is as follows: "It is a well known rule in the law of descent, that a reversion or remainder expectant on a freehold estate will not, during the continuance of such freehold estate, pass by descent from a person in whom a title thereto had vested by descent, as a new stock of inheritance, unless some act of ownership which the law regards as equivalent to an actual seisin of a present estate of inheritance had been exercised by the owner over such expectant estate. But it is otherwise when the future estate was acquired by purchase, because the purchaser becomes a new stock of descent, and on his death the estate passes directly to his heirs at law."

We understand what is meant by the qualification of the rule expressed in the sentence, "unless some act of ownership which the law regards as equivalent to an actual seisin," is when the reversioner or remainderman, to whom the estate has come by descent, conveys his estate to a stranger, he is a purchaser and as such becomes the stirps of a new stock of descent, and any one claiming the land after his death must make himself heir to him and not to the original donor from whom the estate was originally derived. The conveyance takes the estate out of the old line of inheritance and puts it in one entirely new. That being so, *a fortiori* is the effect of a conveyance by deed or devise from the original owner to one for life, remainder in fee to a stranger, where the absolute estate is parted with.

The rules above cited would seem to embody these three propositions:

(1.) When the reversion or remainder expectant upon a freehold estate comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, he who would claim

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the estate by inheritance must make himself heir to the original donor, who erected the particular estate, for it is the old inheritance.

(2.) Where the reversion or remainder comes by descent, and before the determination of the particular estate it is conveyed by deed or devise to a stranger, the donee takes by purchase; he becomes a new stock of descent and the estate will descend to his heirs.

(3.) Where the remainder or reversion is acquired by purchase, then he who would claim the estate must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession; for the remainderman or reversioner, by such purchase, has become a new stirps of descent.

This last proposition, in addition to the authorities already cited, is supported by the following: In *Doe v. Hutton*, 3 Bos. & Pul. 650, Lord ALVAUX, O. J., in speaking of reversions and remainders, after citing numerous authorities, uses this language: "These, and many other cases, which I shall forbear to mention, prove that where there is an intermediate estate (freehold), there is no seisin, though as I before observed, if a man purchase a reversion expectant upon a freehold, it will descend to his heirs, though it has never come into possession;" and *Burton on Real Property*, p. 48, thus mentions the same doctrine: "If a person has purchased, *i. e.*, acquired by conveyance, or devise, lands and tenements in fee simple, of which from the nature of the estate he cannot obtain seisin, these on his intestacy will descend to his heirs. Of such a nature is a remainder expectant upon a particular estate of freehold, and this remainder, vesting in the heir by descent, will not, if it remain untolled, descend to his heir, as such, but still to the heir of the first purchaser," which we find thus illustrated by another author: "If A., the reversioner, remainderman, or executory devisee, died before the event which brought the interest into possession, such interest did not so attach in B. the then heir of A., as to carry it upon B.'s death to C., the heir of B.; but D., the heir of A. at the time of the interest falling into possession was entitled." Hubback Ev. of Succession, 136; Ch. 15a; Butler's Note, 6.

Our conclusion is, the plaintiffs cannot establish a title to the land in controversy by claiming as heirs of George Hay, Jr., and are therefore not entitled to recover in this action.

The judgment of the Superior Court is therefore reversed, and

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judgment must be entered here that the defendants go without day and recover the costs of the appeal.

Error.

Judgment reversed.

WILLIAMS V. GLENN.

(98 N. C. 252.)

Surety — contribution between sureties — evidence.

In an action by an apparent principal against an apparent surety on a sealed note for contribution, evidence is competent to show that both were principals.

ACTION for contribution. The opinion states the case. The defendant had judgment below.

Clement & Gaither, for plaintiffs.

D. M. Furches, for defendant.

ASHE, J. The plaintiffs Joseph Williams and Nathaniel Boyden, and defendant's testator executed a sealed note to J. C. Conrad, guardian of certain minor heirs, which is in the following form: "We, Joseph Williams, Jr., as principal, and N. Boyden and Tyre Glenn as sureties, promise to pay," etc. Boyden paid one-third of the amount of the note, and plaintiff the residue, and brought this action against the defendant as executor of Tyre Glenn for contribution. The defendant contended, that upon the face of the note, his testator was only surety for Joseph Williams, and was not liable to him for contribution. The plaintiff alleged in his complaint and offered to prove on the trial, that the said note was given upon a consideration for the common benefit of the three parties who signed it, and that it was agreed at the time of its execution that they were all three to be equally liable as principal, but that upon the suggestion of the attorney who drew the note, that the law required guardians to take notes with good security, it was drawn in the form as if Joseph Williams was principal and the others sureties.

The defendant objected to this evidence upon the ground that it would alter, contradict and vary the written agreement of the parties.

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His honor sustained the objection, so that the question presented for our consideration is, when a note is signed by one person as principal and others as sureties, is it competent for him, who appears upon the face of the note as principal, after paying the amount of the note, in an action for contribution against those who appear to be sureties only, to offer parol evidence to show that they were all principals and equally liable?

This is the first time this question has been presented to this court for adjudication. Questions somewhat similar were decided in *Welfare v. Thompson*, 83 N. C. 276; *Cole v. Fox*, 83 N. C. 463, and *Goodman v. Litaker*, 84 N. C. 8; s. c., 37 Am. Rep. 602. These cases differ from this, in that there they all appeared to be principals upon the face of the instrument, and parol evidence was admitted to show the fact of suretyship, upon the principle that it would be inequitable for the creditor, after knowledge of the suretyship, to do any act impairing the rights of the surety, and it could make no difference whether the fact was brought to the knowledge of the creditor by the instrument itself or by extrinsic evidence.

In this case, one of the parties appears, upon the face of the instrument, to be principal, and the others, sureties, and it is proposed by the plaintiff, the nominal obligor, to show that they are all principals. The defendant resists the proposition of the plaintiff, and to sustain his position his counsel, in his brief, has cited numerous authorities, both text-writers and decisions of this court, to establish the fact that parol evidence is not admissible to contradict, add to, or vary a contract in writing. That doctrine is admitted. But it has no application to a case like this. The principle laid down in those authorities, and relied upon in support of the defendant's position, applies to actions upon notes between the parties thereto, but has no application to actions between the makers or obligees of notes or bonds, for contribution. In the latter cases, it is well settled, we think, by the overwhelming weight of authority, that parol evidence is admissible to show the relation subsisting between the makers of a note to each other, and especially so in courts like ours, where the distinction between actions at law and suits in equity are abolished. Such proof does not contradict, add to, or vary the terms of the contract, but it simply proves a fact outside of and beyond such terms. It is a fact collateral to the contract and no part of it. It is not to affect the terms of the contract, but to prove a collateral contract and rebut a presumption;

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Brant Suretyship and Guaranty, 17, and applied as well to bonds as promissory notes. Ibid 18. In *Robinson v. Lyle*, 10 Barb. 512; it was held that "as between the makers of a promissory note and the holders all are alike liable, all are principals; but as between themselves, their rights depend upon other questions, which are the proper subject of parol evidence. On the trial of an action therefore between the signers of such a note, it is right to receive extrinsic proof to show which of the parties signed the note as principal and which as sureties." To the same effect is *Sisson v. Barrett*, 2 N. Y. 406.

The distinction is this: As between the makers and payee of a note, it is made for the purpose of being the proof of the contract, and is the exclusive proof of the contract, and cannot be contradicted by extrinsic proof. The only exception to this rule is in the class of cases like *Thompson v. Welfare* and the other cases of that character cited above. But as between the signers, it was not made or intended to be exclusive proof of the agreement or relation between them. That may be shown by parol proof. "The makers, though all appearing to be joint principals, may be shown to be some principals and some sureties; an apparent principal may be shown to be a surety—an apparent surety, a principal." *Adams v. Flanagan*, 36 Vt. 400, and *Lathrop v. Wilson*, 3 Vt. 604. Where one of two parties to a note signed with the addition of surety to his name, and the other without any addition, it was held that the legal presumption was that the signer who had the word surety attached to his name was surety, but it was not conclusive, and that the real purpose and relation of the parties might be shown by parol. To the same effect is *Barry v. Ransom*, 12 N. Y. 462; *Lapham v. Barnes*, 2 Vt. 213; *Keith v. Goodwin*, 31 Vt. 268.

These decisions, in the courts of New York and Vermont, are supported by the decisions in other States on this subject, notably among which are *Lacy v. Loftin*, 26 Ind. 324; *Kelly v. Gillespie*, 12 Iowa, 55; *Crosby v. Wyatt*, 23 Me. 156; *Oldham v. Brown*, 28 Ohio St. 41. We might cite other authorities but we consider these sufficient to fortify the proposition contended for by the plaintiff.

The fact is not overlooked that the decisions cited are mostly upon matters arising upon promissory notes. But the same reasons apply with equal force to sealed instruments. Brant Suretyship and Guaranty, 18; *Fowler v. Alexander*, 1 Heisk. 425; *Creig v.*

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Hedrick, 5 W. Va. 140; *Kennebeck Bank v. Turner*, 2 Greenl. 42, where a party was permitted to show by parol evidence the actual capacity in which he became a party to the obligation.

The investigation of the question leads us to the conclusion that there is an error.

The judgment of the Superior Court is therefore reversed, and this opinion must be certified to the Superior Court of Yadkin county, that *venire de novo* may be awarded.

Error.

Judgment reversed.

TORRENCE V. DAVIDSON.

(98 N. C. 437.)

Executor and administrator — diligence in collecting.

To secure a debt due an estate, an administrator made a further loan and took a mortgage to cover the whole. The debtor was embarrassed; the original debt could not probably have been collected, and the debtor refused to secure it without a further advance. The debtor became insolvent and the mortgage proved insufficient. *Held*, that the administrator was not liable for the loss.

ACTION on administrator's bond. The opinion states the facts. The plaintiff had judgment below.

George E. Wilson, for plaintiffs.

W. P. Bynum, for defendants.

SMITH, C. J. J. T. Davidson died intestate in March, 1874, and soon after letters of administration issued to the defendant, E. C. Davidson, who, with the other defendants as sureties, gave the bond on which the present action is brought by some of the distributees to recover their share in the estate.

Among the effects which passed into the possession of the administrator were four promissory notes executed by R. D. Graham, respectively, in the months of June, August, September and November previous, and which matured twelve months after their several dates. They were unsecured, and the administrator, apprehensive of loss from the large indebtedness of the maker, endeav-

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ored to affect a settlement, and after repeated efforts obtained from him the promise of a mortgage on a lot in Uharlotte. Afterward, and at the solicitation of the administrator, on his making an additional loan and extending the time of payment, he procured a mortgage from Graham on said lot and several others, in value deemed amply sufficient to secure the debt. The deed bears date September 25, 1875, and was registered the next month. It authorized a sale by the mortgagee in case of default after the expiration of the year. The property thereafter declined in value, and in the expectation of improvement, the sale was deferred until September, 1877, when suit was brought for a foreclosure, and under a decree of the court the lots were sold in March, 1878, for \$1,810 to the administrator, he being the highest bidder, the report of which sale was made and confirmed. The administrator offers to surrender the property to the distributees on being exonerated from further liability on account of these notes.

The registration of the mortgage was postponed with the mortgagee's consent, until notified by Graham to have it done, on his promise to let the former know when he was threatened with suits by other creditors, and declaring if the administrator attempted to sue, the other creditors would be notified, and the administrator must look to the mortgaged property alone for his debt. Judgments were recovered by other creditors and docketed on May 11, 1877, amounting to \$30,000, and Graham has become wholly insolvent.

The administrator is himself a distributee, in the estate of the intestate and as such entitled to share therein.

Upon these findings the court was of opinion that the administrator "did not exercise due diligence in the collection of the notes," and ruled that he was chargeable for their full amount. From this ruling the defendants appeal, and it is the only matter involved in the account rendered by the referee open to examination.

We do not assent to the conclusion of law deduced from the facts, of such inattention and remissness as subjects the administrator and his sureties to the payment of the entire indebtedness, for reasons which may be thus summarily stated:

1. Some assurance of fidelity to the trust assumed with its obligations is furnished in the fact of his having a common interest with others in securing the fund for the estate.

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2. He acted with a prudent caution in not at once resorting to coercive measures, and precipitating an unfavorable result, under the menace that if he did so other creditors would be notified and allowed to appropriate to their demands the other property of the debtor, for this must be the import of his words, that in such case, the administrator would not be allowed to share with them, but must be content with what he had already secured under the mortgage.

3. He pressed his claims in a less direct manner, suggested by information of the heavy indebtedness overhanging the debtor, and his precarious financial condition, and by means of a further loan and longer indulgence, secured the preferential assignment of property considered ample for the amount of the mortgage debt.

4. The delay in closing the mortgage was prompted by the hope of a recovery from the depreciation which had fallen upon the lots, and as soon as it failed, steps were taken and carried out for the sale.

5. To prevent greater loss, the administrator bid off the lots and now offers to surrender them for the benefit of the estate.

Throughout the administrator has acted with an earnest desire to save the debt and to protect the trust estate from loss, and even now it is not seen wherein he has been derelict in duty or how he could have better managed the fund. He has exercised vigilance and attention in his efforts to promote the interests committed to his care, some portion of which was personal. If instead of procuring the mortgage, he had proceeded by action, while perhaps the whole might have been saved, the indications rather are that this indebtedness would have shared the fortune of the large amounts in the docketed judgments, and with more reason in such case would a personal accountability have been incurred, had he declined to take the offered mortgage upon the prescribed terms.

The cases cited in the brief of counsel for the appellee, go no further than to demand diligence and fidelity in the discharge of fiduciary obligations, and prompt action when it does not endanger the safety of the fund. But if coercive measures vigorously pushed are likely to result in loss, the fiduciary is not required to adopt them, for a prudent regard to the interests committed to his hands is quite as much a duty as active conduct under other circumstances. In a case where an executor was sought to be held responsible for retaining certain Mexican bonds until their depre-

ciation caused a loss, Sir C. C. PEPPYS, master of the rolls, used this language: "I have found no case and none has been produced in which an executor has been called upon to bear the loss that has arisen, because in the *bona fide* exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately." *Buxton v. Buxton*, 1 Mylne & Craig, 80.

But we have been referred to a recent case, the report of which is not accessible, the facts of which are found in 10 Jacobs' Fisher's Digest, 15,820, briefly stated, are very similar to the present.

A testator died in possession of certain notes, which coming into the hands of his executor, were presented to the debtor for payment. This the latter was unable to meet unless by selling certain real estate under mortgage, sufficient as he believed to discharge both the mortgage debt and that of the executor. The mortgagees made further advances but no payments were made to the executor. Being again pressed the debtor filed a liquidation petition that he said he would have resorted to in case he had been pressed at an earlier period. It was sought to charge the executor with the loss of the debt, and it was held that he was not liable, as no such negligence was shown as to put that burden upon him.

The proper measure of fiduciary liability where loss has been sustained is laid down with many adjudications in its support, in the recent case of *Patterson v. Wadsworth*, 89 N. C. 407, in quoted words, as follows: "Executors should not be held responsible as insurers. All that a sound public policy requires is that they shall act in good faith and with ordinary care."

More cannot be reasonably demanded, nor does the law impose a higher obligation at the peril of individual loss.

Tested by this just and salutary rule, we shall find in the conduct of the administrator in the management of these notes no other than an earnest desire to save of them all that he could, and the use of such means as seem to assure advantage to the estate. He had at one time, apparently at least, secured the entire debt, and the delay was a condition upon which the mortgage deed was obtained, and the subsequent forbearance of sale was prompted by an unwillingness to sacrifice the property, and in the hope, though it ended in disappointment, that there would be a reaction from the depreciated market value in real estate.

It does not appear what or whose money was used in the loan by which the conveyance was obtained. Nor is it of any moment to

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inquire, since without objection the whole proceeds of sale are applied to the notes in controversy, and thereby no detriment on this account comes to the estate.

The report of the referee exonerates the administrator from this loss, and the plaintiff's exception thereto was sustained by the court. In this ruling there is error and the defendant's exception to the reformed account in this feature must be upheld. There is error in the ruling by which the defendants are charged with the entire debt and with the costs of the suit of foreclosure, and these will be stricken out. To this end it is referred to the clerk, and when the account is corrected the plaintiffs are entitled to judgment for what may then be found due to them.

Error.

Judgment reversed.

SAVAGE V. KNIGHT.

(93 N. C. 493.)

Assignment for creditors — fraud — innocence of assignee.

The innocence of the assignee and beneficiaries will not render valid an assignment for the benefit of creditors made with intent to hinder and delay one creditor.

ACTION to recover land. The opinion states the point. The defendant had judgment below.

J. L. Bridgers, Jr., and Haywood & Haywood, for plaintiff.

Connor & Woodard, for defendants.

ASHE, J. His honor charged the jury, "that if the deed of trust was made with the intent to hinder, delay and defraud the creditors of Knight or any one of them, the deed was void, but to have that effect the plaintiff must show that the fraud was participated in by the *cestui que trust* Jones, who drew the deed."

We think the instruction was erroneous, and must have misled the jury, and the error consisted in qualifying the first part of the charge, with the addendum, "that to have that effect the plaintiff must show that the fraud was participated in by the *cestui que trust* Jones, who drew the deed." We have been unable to meet

with any case where the validity of a deed is made to depend upon the participation of the draughtsman in the fraud, alleged. According to the evidence, Jones was an innocent *cestui que trust*, and why select him as the person whose participation in the fraud, if there was one, instead of Lawrence, who was also a *cestui que trust*, and who according to the evidence, upon his own testimony, did not only participate in, but instigated the fraud.

If his honor had instructed the jury that the participation of Lawrence, or any one of the persons who were secured by the deed of trust, was necessary to establish the fraudulent character of the deed, it is most probable that the verdict of the jury would have been different.

We are of the opinion when the judge charged the jury "that if the deed of trust was made with the intent to hinder, delay or defraud the creditors of Knight, or any one of them, the deed was void," he should have stopped there and not have qualified his charge with the additional remarks, for such we understand to be the law in this State.

We are aware that there is a diversity of adjudications in different States upon this question. In New York, for instance, it is held that in deeds of assignment the intent of the assignor to hinder, delay and defeat creditors is sufficient to vitiate an assignment, without any participation on the part of the assignee or those for whose benefit the assignment is made. But in some of the other States it is held that no matter how fraudulent may be the intent of the assignor of a deed of assignment, the deed will be valid against unsecured creditors, unless the fraudulent purpose of the assignor is participated in by the assignees or the *cestui que trust*.

So far as we are able to come to any thing like a definite conclusion from the conflicting adjudications on the subject, the decisions in this State rather concur with those of New York. We have substantially re-enacted the statute, 13 Elizabeth, in this State, act of 1815, the Code, section 1545, which reads: "For avoiding and abolishing feigned, covinous and fraudulent gifts, grants and alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of land, tenements and hereditaments, goods and chattels,

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by writing or otherwise, and every bond, suit, judgment and execution at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices or practices aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded) to be utterly void and of no effect."

The provisions of the statute are so plain that "he who runs may read." It is a remedial statute, and should be construed so as to abridge the mischief and enlarge the remedy. We cannot conceive in the construction of the statute how the validity of a deed of assignment alleged to be executed with a fraudulent intent can in any way depend upon the honesty of purpose in the assignee. The assignor makes the assignment, and no one else, and the making intent is his and no one else's.

It is the intent and purpose existing in the mind of the insolvent debtor at the time of making the assignment, to delay, hinder, defeat and defraud his creditors, that vitiates his assignment and renders it void. This is the construction given to the statute by some of the ablest jurists who have sat upon the bench. In *Hafner v. Irvin*, 1 Ired. L. 490, Judge GASTON uses this language: "Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute against fraudulent conveyances. It is not embraced within its words, which apply only to such as are contrived of malice, fraud, collusion or covin, to the end, purpose and intent to delay, hinder and defraud creditors." The decision in this case is cited with approval by Chief Justice RUFFIN in *Lee v. Flannagan*, 7 Ired. 471, where the learned judge says: "The very power of an insolvent debtor to give preferences implies that the effect may be that some of the creditors may lose their debts. Therefore the distinction is that where a deed in favor of one creditor is made for the purpose of defeating another creditor it is fraudulent; but that is not so when the loss of the latter is merely a consequence of the preference given to a just debt." And again in *Cansler v. Cobb*, 77 N. C. 30, when an old

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man, much embarrassed, conveyed his land to his daughter in consideration of services rendered and to be rendered in attending upon him in his old age, with intent to defraud his creditors, although the daughter had no knowledge of the fraudulent intent, it was held, Chief Justice PEARSON speaking for the court, that the deed was fraudulent.

In this case the invalidity of the conveyance is not made to depend upon a participation of the grantee in the fraud, or a knowledge of the fraudulent purpose of the grantor in conveying his property. In New York, the construction given to a similar statute is that "in determining upon the validity of an assignment made by a debtor, the intent of the assignor is the material consideration. Honesty of purpose in the assignee is not the test." *Wilson v. Forsythe*, 24 Barb. 105. And again in *Rathbun v. Planter*, 18 Barb. 272, it was decided that "an assignment made by a debtor of his property with the fraudulent intent to hinder, delay and defraud his creditors, is void, although the assignees are free from all imputation of participating in his fraudulent doings, and they are themselves *bona fide* creditors of the assignor, and are to take the entire avails of the assigned property to pay their preferred debts."

To the same effect is *Mohawk Bank v. Atwater*, 2 Paige, 54.

Lord MANSFIELD said in *Cadogen v. Kennett*, Cowper, 434: "The question in every case is whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors." The same principle is maintained in Michigan, 2 Mich. (Gibbs), 309, and in several other States.

All the cases here cited were deeds of voluntary assignments in trust to pay debts, except *Cansler v. Cobb*, and *Cadogen v. Kennett*, and in none of these cases is it held that the participation of the assignee in the fraudulent purpose of the assignor is a necessary element in the transaction to vitiate his deed. In such cases it is the *mala mens*, the fraudulent and covinous intent and purpose at the time of the concoction of the deed, that makes it void, no matter how innocent the assignee may be.

But there lies a distinction between such voluntary conveyances and absolute conveyances for a valuable consideration. In these latter cases, when there is a valuable consideration paid by the grantee, he gets a good title, notwithstanding the intent of the maker to defraud, if he is not a party to such fraud, and buys without any knowledge of the corrupt intent. *Reiger v. Davis*, 67 N.

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U. 185; but when there is collusion between the grantor and grantee to hinder and defraud the creditors of the former, the conveyance will be void, even though the deed be founded upon a valuable consideration.

The distinction is recognized by GOULD, J., in a note to his opinion in the case of *Wilson v. Forsyth, supra*, to the effect that in absolute conveyances, differing in that respect from voluntary deeds of assignment, the honesty or *bona fides* of the grantee does operate to make good a conveyance which the grantor intended to aid him to delay and defraud other creditors.

The distinction seems to be to us a sound one. A voluntary deed is the result of the operation usually of but one mind, that of the grantor; but a deed purporting to convey the estate absolutely is a contract, and requires the concurrence of the minds of both the grantor and grantee.

This view of the subject is fully sustained by this court in the case of *Lassiter v. Davis*, 64 N. C. 498, where READE, J., speaking for the court, says: "The distinction seems to be this: 1st. A voluntary gift or settlement is void, if it was the intent of the maker to hinder, delay or defraud, whether the party who takes the gift participated in the fraudulent intent or not. 2d. An absolute conveyance for a valuable consideration is good, notwithstanding the intent of the maker to defraud, unless the other party participated." The fraud must enter into and affect the contract.

There is a class of cases which would seem to form an exception to the interpretation here given to the statute by the cases above cited, as when there are several independent debts secured in an assignment, some of which are good and others fictitious and illegal. It has been held that the latter debts may be eliminated from the assignment and that the deed will stand as to the good debts. Notably are the cases of *Brannock v. Brannock*, 10 Ired. L. 428; s. c., 51 Am. Dec. 398, 428; *Harris v. DeGraffenreid*, 11 Ired. 89; *Morris v. Pearson*, 79 N. C. 253. It is difficult to reconcile the decisions in these cases with those we have cited above, but it is not necessary that we should undertake to do so, for they have no application to the present case. Here there were no fictitious or illegal debts attempted to be secured in the deed, and the question is squarely presented whether a deed of assignment made by an insolvent debtor with the intent and for the purpose of delaying, hindering and defrauding a creditor is void, without any participa-

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tion of the assignee or the beneficiaries under the deed, and we are of the opinion that it is void, not only against the party defrauded, but to all intents and purposes, so that if it shall be found by the jury in this case, that the deed made by Knight to Bryant was made with the fraudulent intent mentioned in the statute, the deed will be void, and all the trusts secured in it must necessarily fail. It may seem a hard case upon the innocent creditors secured in the deed, but it is equally hard on the party defrauded, who is not less innocent than the others, and more deserving, because the statute was passed expressly for his protection.

Some deeds are void upon their face, and in such cases it is a question of law for the court, but when the validity of a deed depends, as in this case, upon the intent with which it was made, it is peculiarly a question within the province of the jury, and in such cases, when the rights of innocent persons are involved and not unfrequently to large amounts, a jury should require the most satisfactory proof of the fraudulent intent before they return a verdict finding the fraud.

The more critical scrutiny into the intentions and purpose of the debtor is required, because he has the right to prefer one creditor to another, and his right to do so is only abridged when he exercises it, as said by Judge GASTON, "with contrived malice, fraud, collusion or covin, to the end, purpose and intent, to delay, hinder and defraud creditors."

We are of the opinion there is error, and it must be certified to the Superior Court of Edgecombe county that a *venire de novo* may be awarded.

Error.

Judgment reversed.

WILLIAMS V. JOHNSTON.

(92 N. C. 582.)

Agency — for collection — invalid payment.

A debtor delivered timber to an agent authorized to collect the debt, for the agent's individual use and to be applied on a judgment. *Held*, not a discharge of the debt.

ACTION to enforce payment of a debt by sale of a testator's lands. The opinion states the case. The defendant had judgment below.

Williams v. Johnston.

R. O. Burton, Jr., for plaintiffs.

Mullen & Moore, Day & Zollicoffer and Walter Clark, for defendants.

SMITH, C. J. William W. Brickell, as guardian of the *feme* plaintiff, sued and recovered judgment against John W. Johnston, administrator of William L. Johnston, a prior guardian, at May term, 1866, of the County Court of Halifax, for the sum of \$4,485.19 due the ward, with interest thereon from the first day of January preceding. A portion of the amount was collected, but the estate of the debtor was insufficient to pay all, and on October 24, 1873, there remained unpaid of principal money \$908.06 and \$196.40 in costs incurred. Alfred W. Simmons, a surety on the bond of the first guardian, died in 1867 possessed of real and personal estate, and leaving a will wherein he appoints the defendant John W. Johnston, executor, and devises to the *feme* defendant Susan F. Johnston, the several tracts of land described in the plaintiff's complaint, and these, the small personalty that passed into the executor's hands being exhausted, constitute the only property of the testator out of which the indebtedness can be satisfied. The present suit is to enforce payment by a sale of the lands, or so much of them as shall be necessary to discharge the judgment.

The defense set up is that the demand has been paid, and the only issue presented to the jury is whether the debt of \$1,104.46, or any portion and what portion of it, has been paid. The response is that the judgment has been paid and satisfied.

A small sum, \$150, it was admitted, had been so received and applied by the plaintiff James L. Williams, acting for and on behalf of his wife.

The testimony of John W. Johnston, examined on his own behalf, was in substance, that the male plaintiff, in 1876, bought a saw-mill and put it on witness' land, with his consent, to be there operated and run for the said plaintiff; that at the same time it was agreed between them that the plaintiff might cut trees on the land for the use of the mill, paying twenty-five cents for each, and that the money due therefor should be in settlement of the judgment.

The plaintiff James L. Williams testified for himself that he purchased and sawed up the trees and was to pay the stipulated price,

but "did not bargain that the timber at twenty-five cents should go on this debt."

It was in evidence that James L. Williams, who had received payments on the judgment, rents out his wife's real estate, which is considerable, attends to all her out-door business, and has erected and removed buildings upon her land, she being not competent, physically, to attend to her own affairs.

The plaintiff also stated that he had control of his wife's land, and the management of her business matters, and that since the transaction with the defendant, the agency had been constituted in a writing, which had been spread upon the registry, but he had, since as before, exercised the same general authority.

The other evidence relates to the number of trees cut down and used, and we put it out of view as unimportant in considering the matter brought up on the appeal.

The plaintiff requested the court to charge the jury:

1. That a general authority to collect a debt does not authorize a settlement of it in timber trees.

2. "That there was no evidence before them to warrant them in finding that James L. Williams was authorized to settle the judgment in trees, or a gin-house."

The court declined to give these instructions, and instead gave the following:

"That they should first determine whether the plaintiff Williams was the general agent of his wife for the transaction of her business. If they should so find, they should then proceed to determine whether said Williams had made a contract with Johnston to take pay in timber trees, and if they should so find and also that such payment in trees had been made to him, then it would be binding, and they should find the first issue 'yes.'" Plaintiff excepted.

To the first issue the jury responded "Yes."

In our opinion the instructions given upon the evidence were misleading and erroneous, in that a general agency does not itself give sanction to what was done. An agency, however comprehensive in its scope, nothing else appearing, contemplates the exercise of the powers conferred for the benefit of the principal. It implies a trust and confidence that the delegated authority will be employed in the honest and faithful discharge of the duties appertaining to the fiduciary relation thus established. A power to collect and settle a debt, conferred without limit, leaves the medium of pay-

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ment largely at the agent's discretion, but it does not extend to a misapplication of the fund to his own personal advantage. A third party may make the payment, and he is not responsible for the misuse of the money. It is enough for his protection to know that the authority is possessed, whatever disposition may be afterward made of the fund by the agent. But when the contract itself involves a misapplication of the money or other article of value to the agent's own use while it should go to the principal, it will not be enforced to the injury of the latter, unless assent is shown or is implied from past transactions. An agency involves integrity and fidelity in the agent, an exercise of power not for his own, but in the interest and for the intended benefit of him who confers it.

Thus an agent, entrusted with a horse to sell for his principal, cannot dispose of him to his own creditor in payment of his own debt. *Parsons v. Webb*, 8 Greenl. 38; s. c., 22 Am. Dec. 220.

An attorney having authority to collect a debt due his principal cannot commute the debt by exchanging it for one due from himself to the debtor. *Kingston v. Kincaid*, 1 Wash. C. C. 454.

The very relation between the parties requires good faith, and one who participates, in his own interest, in the conversion of a trust fund to the use of the agent or trustee, is not allowed to take personal advantage therefrom. It is an unwarrantable inference proposed to be drawn from a general agency, a right to appropriate what is received to the agent's own use in the absence of any previous authority or subsequent sanction to such act.

In the present case the defendant contracts with the husband and agent of the *feme* creditor that timber, to be supplied to him for his own known individual use in running his own mill, shall be applied to the extinguishment of her judgment debt, in disregard of his assumed fiduciary obligation, with no other evidence of her approval of this or other misapplication, beyond that of his general agency to manage her business and collect her debts. Will the court give its sanction to this perversion of authority, concurred in and rendered effectual by the defendant, and thus deprive the *feme* of her property?

In this aspect the charge is misleading. The inquiry should have gone beyond the existence of a general agency, and extended to an assent, actual or implied, to this misuse of her funds. The issue was too narrow and the instruction too restricted. The agent's right to use the property of his principal is not an incident to its manage-

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ment, and such the jury would naturally understand to be the meaning of the instruction. It must be declared there is error and the plaintiffs entitled to a *venire de novo*.

To this end let this be certified for further proceedings in the court below.

Error.

Judgment reversed.

GATLING V. COMMISSIONERS OF CARTERET.

(93 N. C. 586.)

Taxation — set-off — "debt."

A tax is not a "debt," and in an action by a municipal corporation to enforce a tax, the defendant may not set off or counter-claim, either in law or equity, a debt due him from the corporation.

MOTION for injunction. The opinion states the case.

Walter Clark and J. W. Hinsdale, for plaintiffs.

ASHE, J. This was a civil action brought by the plaintiff against the defendants as commissioners of Carteret county, to have a debt due to him by the county set off against certain taxes assessed against him by the commissioners for the years 1882 and 1883, and for an injunction against the defendants, to restrain them from collecting said taxes.

The plaintiff in his complaint alleged that the county of Carteret was indebted to him in the sum of \$8,000, evidenced by two judgments against the board of commissioners of said county, each for the sum of \$4,000, founded upon bonds issued by the board of commissioners of said county under the provisions of an act of the general assembly of the State of North Carolina, entitled "An act to incorporate the North Carolina Railroad Company and the North Carolina and Western Railroad Company," ratified the 27th of December, 1852, whereby the said company and its properly constituted authorities became bound to levy annually on the persons, lands and other property within said county, and collect such taxes as may be sufficient to pay such bonds and interest. That the judgments are still due and owing, no part thereof having been paid, and that pay-

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ment has often been demanded; that the plaintiff has property situated at Morehead city in the county of Carteret, which has been assessed for taxes for two years, 1882 and 1883, both for State and county purposes, and the tax-lists have been placed in the hands of the sheriff of said county for collection; that he has paid all of the taxes due for those years, except the general tax for county purposes, so far as they have come to his knowledge; that he is entitled in equity and good conscience to have the said indebtedness of the county to him declared a set-off or counter-claim *pro tanto* against said residue of taxes, and he prayed for such application and for a restraining order enjoining the defendants from collecting such residue.

The defendants answered the complaint, admitting some of the allegations thereof and denying others.

The plaintiff then moved for a restraining order founded upon an affidavit, varying but little from the allegations in his complaint, and the defendants filed a counter-affidavit similar to their answer.

On the 28th day of March, 1884, his honor A. C. AVERY, at Chambers, granted the restraining order as prayed for, to be heard before his honor J. E. SHEPHERD, and it having been agreed between the counsel of both parties that his honor should try the cause upon the facts found by him, and the complaint and answer, his honor found the facts substantially as stated in the affidavit of the plaintiff, and adjudged that the plaintiff was not entitled to the relief demanded, and that the action be dismissed and the defendant to recover his costs to be taxed by the clerk.

The sole question presented for our determination is, whether the plaintiff can set up the judgments which he has against the county as a set-off or counter-claim against the taxes admitted by him to be due to the county for the years 1882 and 1883.

The position taken by the plaintiff in seeking to set off the debt due him from the county of Carteret against the taxes assessed by the county authorities upon his property situated in that county, cannot be sustained upon any principle of law or equity.

It is certainly an action of the first impression. Matter which is purely defensive in its character, and is only allowed as a defense to an action, is sought to be used as the gravamen of an action. As a counter-claim it cannot avail the plaintiff, for that is in the nature of a cross action, and must be a cause of action existing in favor of

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a defendant and against a plaintiff, between whom a several judgment might be had. Code, § 244.

There is no rule of practice or procedure, known even to the loose pleading tolerated by the Code system, which allows a plaintiff to set up a counter-claim against a defendant — such an action is an anomaly in legal proceedings.

The same observations apply with equal appositeness to a set-off, which like the counter-claim, is a defense to the action, and only exists where the demand, as well of the plaintiff as of the defendant, is a debt, such a demand as under the old practice could only be recovered by an action of debt or *indebitatus assumpsit*, but enlarged by the Code so as to embrace any cause of action arising on contract existing at the commencement of the action, extrinsic to the plaintiff's cause of action. Code, § 244; *Hurst v. Everett*, 91 N. C. 399. But still it must be a debt in the broad sense of that term, a demand for money due, founded upon contract.

But a tax is not a debt. "Taxes are not debts in the ordinary sense of that term, and their collection will in general depend on the remedies which are given by the statute for their enforcement. When no remedy is specially provided, a remedy by suit may fairly be implied, but when one is given which does not embrace an action at law, a tax cannot in general be recovered in a common-law action as a debt. Taxes are not demands against which a set-off is admissible; their assessment does not constitute a technical judgment; nor are they contracts between party and party, either expressed or implied, but they are the particular acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcement of which their personal consent individually is not required." *Cooley Taxation*, 15 and 16.

In *City of Camden v. Allen*, 2 Dutcher, 398, the Supreme Court of New Jersey say, "a tax, in its essential characteristics, is not a debt, or in the nature of a debt. A tax is an impost levied by authority of government upon its citizens or subjects, for the support of the State. It is not founded upon contract or agreement, it operates *in invitum*." To the same effect is *Shaw v. Pickett*, 26 Vt. 486.

If then a tax is not a debt or obligation to pay money founded upon a contract, it cannot be liable under any circumstances to a set-off. In the case of *City of Camden v. Allen*, *supra*, the court said: "Debt is the subject-matter of set-off, and is liable to set-off;

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a tax is neither. To hold that a tax is liable to set-off would be utterly subversive of the power of government and destructive of the very end of taxation." *Cooley Taxation, supra; Finnegan v. City of Fernandina*, 15 Fla. 379.

In *Battle v. Thompson*, 65 N. C. 406, it was held by the court that a defendant cannot offer as a set-off or counter-claim against the State the indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owes; and the decision was put upon the ground that a State cannot be sued by its citizens. But a municipal corporation, as a city or county, may be sued, and in the case of *Cobb v. Corporation of Elizabeth City*, 75 N. C. 1, it was held that "debts owing by the town corporation, in whatever form they may be evidenced, cannot be set off against a demand for town taxes, unless there be a special contract to that effect."

The authorities above cited lead us to the conclusion that the plaintiff is not entitled at law to the relief he seeks by this action, and the question then arises whether he is entitled to the relief he seeks through the aid of the equitable jurisdiction of the court.

We know of no head of equitable jurisdiction under which this case can be brought. The power to levy taxes is a function of government, and is incident to any government, whether State or municipal, essential to its very existence. Without it no government could exist, and to be deprived of it, every government must fall to pieces. Governments are formed to promote the public good, and taxation in some form or other is indispensable to the attainment of that end.

To accord to the courts of chancery the power to interfere with taxation by interposing to set off the indebtedness of the government against the taxes, might greatly embarrass the operation of its machinery, if not clog its very wheels. The courts of chancery are therefore not clothed with any such power.

In the case of *Finnegan v. City of Fernandina, supra*, the court say, "to enjoin the collection of municipal taxes due upon property owned by individuals to the extent that there is a debt from the city to such individual is the exercise of the power of appropriation and interference with public trusts and the exercise of delegated sovereign power, which has not received the sanction of any court."

* * * "If the tax is due the party should pay it. A court of equity will not aid him in resisting the just and legal demand of

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the government. It will not step in for such reasons and protect a party in not paying a tax which he admits is due. This is a familiar principle obtaining in all the States."

In *Rees v. City of Waltham*, 19 Wall. 107, and *Rees v. City of Waltham*, 19 Wall. 658, it is held that the failure of the ordinary legal remedy, because it has not been used at law with sufficient success by the plaintiff to secure his debt, does not therefore confer upon the court of chancery any jurisdiction. To same effect is *Burroughs on Taxation*, 456.

There is no error. Judgment of the Superior Court of Carteret county must be affirmed.

No error.

Affirmed.

LAWRENCE V. HODGES.

(22 N. C. 672.)

Ship and shipping — registration — mortgage.

A vessel, used exclusively in North Carolina waters, was enrolled under the act of Congress. It was mortgaged, and the mortgage was recorded in the custom house, as required by the act, but not registered as required by the State law. *Held*, that the recording was valid.

CLAIM and delivery. The head-note states the point. The defendant had judgment below.

George H. Brown, Jr., for plaintiff.

W. B. Rodman & Son and *C. F. Warren*, for defendant.

MERRIMON, J. The record in this case, in different aspects of it, presents several interesting questions that were ably argued by the counsel on both sides. We deem it necessary to decide but two of them, and these are: First. Was the steamer "Edgecombe" subject to the laws of the United States regulating domestic commerce? Second. If so, were the two mortgages of that vessel, under which the plaintiff claims title to it, proven as required by law?

In our judgment, both these questions must be answered in the affirmative.

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The Constitution of the United States in prescribing and defining the powers of Congress in article 1, section 8, provides among other things that it shall have power “to regulate commerce with foreign nations and among the several States and with the Indian tribes.”

It is well settled that the power thus conferred in the respects specified is paramount and exclusive. Necessarily incident to that power is that to regulate navigation, and this includes ships, steamboats, sail and all manner of vessels, however propelled, that go upon navigable waters that flow from one State into another and out of a State into the sea, coastwise, and upon the sea, to and from foreign countries. The power to regulate such commerce implies necessarily the incidental power to regulate the essential instrumentalities incident to it.

Such power, within its just scope and purpose, is very thorough in its effectiveness. It is fundamental, and its object is to develop, promote and protect the commerce of a great people for the common good. In accomplishing this end it is not confined, as to vessels that go upon navigable waters, at home or abroad, simply to prescribing methods and rules of navigation and transportation, but it extends to giving them distinctive national character, wherever and in whatever service they may lawfully be, invested with rights, privileges and obligations extending to the owners and all persons having an interest in them—to prescribing the methods of sale and transfer of them or any property interest in them, and to jurisdiction over them for all purposes germane to such commerce.

It would be a supererogatory service to undertake here to show why this is and ought to be so, because it is so settled by a vast number of judicial decisions, both Federal and State, and we content ourselves with citing a few of them, *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. State*, 12 Wheat. 409; *License Cases*, 7 How. 283; *South Carolina v. Georgia*, 93 U. S. 4; *Hall v. DeCuix*, 95 U. S. 485; *Ferry Co. v. St. Louis*, 107 U. S. 365; *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Aetna Co.*, 8 Wall. 491; *Mitchell v. Steelman*, 8 Cal. 363; *Fontaine v. Beers*, 19 Ala. 722; *Shaw v. McCandless*, 36 Miss. 296; 6 Myers Fed. Dec., § 1023 *et seq.*; Desty Shipping and Admiralty, 1-5.

Congress has exercised the power mentioned in many ways and respects. In respect to vessels of a prescribed tonnage engaged in domestic commerce, it has passed laws providing for their enrol-

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ment in the custom house of the collection district in which their respective owners reside, and such enrolment renders them vessels of the United States, and confers upon them national character, rights, privileges and obligations as domestic vessels. Rev. Stat. U. S., § 4311, *et seq.*

It is the enrolment of a vessel that may engage in commerce, and not the character of the particular service it may do that gives it distinctive national character, and renders it subject to the laws of the United States, and brings it within the jurisdiction of that authority. Such enrolment and a license confer the right to go from port to port, to engage in trade, and carry passengers and freight between the several States; such national character goes with and is part of the vessel, wherever it may lawfully go, no matter in what service. *Gibbons v. Ogden, supra.*

Congress has no power to regulate or interfere with the purely internal commerce of a State, and a vessel engaged solely and exclusively in such commerce is subject to its laws and control, if the owner chooses to so use it without enrolment under the laws of the United States. But if the owner shall enroll his vessel, as he may do any time, certainly in the absence of any State statute regulating vessels engaged in such internal commerce, it at once ceases to be a vessel of the State and devoted exclusively to its internal commerce; it then and thereby takes on the character of a vessel of the United States, with the right to go out of the State and engage in inter-State commerce at the will of the owner, if he chooses to obtain a proper license, and by such enrolment it becomes subject to the laws of the United States, no matter where it may be, or in what service it may be employed. An enrolled vessel, engaged solely in the internal commerce of a State, does not necessarily thereby put off or destroy its national character, and cease to be a vessel of the United States, certainly while it goes upon navigable waters that flow into other States, or into the sea. It would be most disorderly and confusing and highly injurious to commerce in various ways, and the stability of rights to and in vessels, to allow their owners respectively to impress upon them the character of a vessel of the State, or the United States, at their pleasure. Such character must arise and be established by proper legal authority.

Now the vessel in question was duly enrolled at the custom-house in New Berne, its home port. By such enrolment she cer-

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tainly became a vessel of the United States, and subject to the laws of that government. If before that time she had been a vessel of this State, engaged exclusively in its internal commerce, and was subject to its laws by such enrolment, it put on the national character and ceased to be in character and legal contemplation a vessel of the State, employed exclusively in its internal commerce; it became a vessel of the United States, engaged exclusively according to the facts as they appear in the internal commerce of this State, with the right to take employment in inter-State commerce at the will of her owner. This is not an impossible but an entirely practicable thing to be done. A vessel solely employed in the internal commerce of a State may be, but it is not necessarily a vessel of that State. A vessel enrolled in New York, having proper authority, might come into the navigable waters of this State, and engage for years exclusively in its internal commerce, but it would not thereby become a vessel of this State in contemplation of law because its character in such case would be established by law, and not by the fact of the particular service, or its nature. It seems to us therefore manifest that the vessel in controversy was, in contemplation of law, a national vessel, and subject to the laws of the United States, applicable in such cases.

It is provided by Rev. Stat. U. S., §. 4192, that "no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled."

It is plainly the purpose of this statute to regulate the methods of conveyance and transfer of vessels, and property interests in them, of the United States. The power of Congress to pass such laws, and the effect of them, has been much questioned. The validity of the statute just cited, and its effect as a registration law, have been repeatedly drawn in question, but it has been upheld as consistent with the Constitution by many decisions, both State and Federal. The Supreme Court of the United States has repeatedly held that it is valid, and its validity may be treated as settled by the highest judicial authority.

It has likewise been held that recording a mortgage under this statute supersedes State registration laws as to the place of regis-

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tration, and gives it priority over a subsequent purchaser, or a subsequent attachment or like lien. *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Aetna Ins. Co.*, 8 Wall. 491; *Shaw v. McCaulless*, 36 Miss. 296; *Fontaine v. Beers*, 19 Ala. 722; *Mitchell v. Steelman*, 8 Cal. 363; *Perkins v. Emerson*, 59 Me. 319; 1 Pars. Shipp. and Adm. 60, 63; *Desty Shipp. and Adm.* § 65.

The defendant's counsel relied partly on the case of *Wiswall v. Potts*, 5 Jones Eq. 184. In that case it was held, that a steamboat used exclusively for the purposes of the internal commerce of a State need not be enrolled in the office of the collector of customs, as required by the statute of the United States. Thus much is true, but it is not true that such a vessel cannot be a vessel of the United States, nor is it true that the mortgage of an enrolled vessel, used exclusively in the internal commerce of a State, need not be recorded in the custom house.

In that case the steamboat had been enrolled. The mortgage of her however had not been recorded in the custom house, but had been registered as required by the laws of this State, and the court held such registration sufficient. If this mortgage had been recorded in the custom house, or if a subsequent purchaser, without notice, had interposed his right to the vessel, a different question would have been presented.

We feel called upon however to say in this connection, that we cannot concur in the reasoning of the late Chief Justice PEARSON in parts of the opinion in that case. For example, he says: "It is the fact that a boat trades to two or more of the States, or to a foreign country, which makes it a vessel of the United States, and the act of registration in the custom house is an incident necessary to give it the privilege conferred thereby." This is certainly an inadvertence. The registration or enrolment of the vessel is necessary to give the privileges so conferred, but it is necessary also to give the vessel national character. The statute of the United States (Rev. Stat. U. S., §§ 4131, 4311), expressly provides and declares, that vessels registered and enrolled as therein required and "no others, shall be deemed vessels of the United States." And it is so laid down in plain terms in *Gibbons v. Ogden, supra*.

This inadvertence or misapprehension seems to have grown out of the supposition that a vessel, engaged exclusively in the internal commerce of a State, is necessarily a part of it and subject to the laws of the State. This as we have seen is so, only so long as the

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owner of such vessel chooses not to enroll it under the laws of the United States. This he may do when he will, certainly in the absence of any law of the State regulating its internal commerce and vessels engaged exclusively in it.

The mortgages in question were acknowledged before the clerk of the Superior Court of Beaufort county and recorded in the custom house at New Berne, where the vessel was enrolled. It is objected that such acknowledgment was not sufficient, because it was not taken by a justice of the peace, a notary public or a commissioner of the Circuit Court of the United States, as required by the Rev. Stat. U. S., sections 1788 and 4193, which latter section, after providing how mortgages and other conveyances of vessels or any interest in them shall be recorded, provides, "but no bill of sale, mortgage, hypothecation, conveyance or discharge of mortgage, or other incumbrance of any vessel, shall be recorded unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds."

We think this objection is not well founded, because the clerk of the Superior Court was by virtue of his office a notary public, and the taking of the acknowledgment must be referred to the exercise of his notarial authority.

The Code, section 3306, provides that "the clerks of the Superior Courts may act as notaries public in their several counties by virtue of their offices as clerks, and may certify their notarial acts under the seals of their respective courts." This is a public statute of which everybody is presumed to have knowledge, and of which the courts of the United States, as well as the courts of this State, take judicial notice, and whenever it appears that the clerk has done an official act that the law requires to be done by the exercise of notarial power, it is treated as done in the exercise of such authority. And so in this case, as soon as it appeared to the court that the clerk had taken the acknowledgment of the mortgages of the vessel to be recorded in the custom house, the court at once recognized the exercise of notarial authority, because the clerk had such authority and he did an act that required its exercise. The nature of the act done sufficiently indicated by what authority it was done, and all persons are presumed to have knowledge of it. It was said on the argument that the clerk did not sign the certificate of acknowledgment as notary public, but as clerk. It was not necessary, indeed not strictly proper, that he should so sign

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it, because his notarial authority was incident to his office as clerk. He took and certified the acknowledgment under his hand as clerk of the Superior Court, and under the seal of his court, in strict compliance with the statute, and his act was as complete and binding as any similar act he could do.

The case of *DeCourcy v. Barr*, Busb. Eq. 181, relied upon by the defendant's counsel, does not apply here. In that case the notary public in New York had no authority to take the acknowledgment of deeds executed by residents of this State; he was only authorized by the statute to take such acknowledgments of non-residents. In this case the clerk had authority and exercised it in the way the statute allowed him to do. *Carpenter v. Dexter*, 8 Wall. 513; *Shultz v. Moore*, 1 McL. 520.

It is unnecessary to inquire whether the clerk could as clerk have taken the acknowledgment because he had notarial authority, and as we have seen it must be taken that he exercised it.

Upon the "case agreed" and submitted to the court, the plaintiff is entitled to have the vessel in question as mortgagee.

There is error. The judgment of the Superior Court must be reversed and judgment entered here for the plaintiff.

Error.

Judgment accordingly.

STATE V. HORNE.

(92 N. C. 805.)

Criminal law — assault.

The defendant unlawfully untied and was driving away the prosecutor's cow, and facing the prosecutor with a cocked gun in his hand and his finger on the trigger, but not pointing it at the prosecutor, he declared that he would kill any one who interfered and laid hands on the cow. *Held*, an assault.

CONVICTION of assault. The opinion states the case.

Attorney-General, for State.

C. W. Tillett and *W. A. Guthrie*, for defendant.

* See 88 Am. Rep. 712.

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SMITH, C. J. The defendant is charged with an assault upon the person of W. F. Shankle, and found guilty upon his trial before the jury.

The testimony of the prosecutor was in substance as follows : Witness had some time before bought a cow from the defendant, and the cow was brought by two persons, whom he had sent after her, to his store, and with a rope over her horns, tied to a post on the side of the road opposite to the plaintiff's store. The witness went out of his store toward the place where the cow had been secured, and found that the defendant had disengaged the rope, and backing himself was by kicks driving the cow off. Defendant then went to his crib, got his gun and with one barrel cocked and his finger on the trigger and the gun held in his arms, but not pointed toward the witness, said if any one laid hands on the cow, he would blow his brains out. Witness asked, "what do you mean?" and was answered, "I mean to die and go to hell in a few minutes." Witness made no attempt, and desisted in consequence of this action and these threats, and re-entered his store. The defendant while driving the cow was face to face with the witness, and seemed to think that witness in going after the rope left on the post, intended to take and tie the cow, but witness had no such intention after these demonstrations.

The court refused to charge as requested, that upon the evidence the defendant was not guilty and gave these instructions :

1. If the defendant was in possession of the cow, and made the threats testified to, but made no offer or attempt to use the gun, though he had it in his possession, he would not be guilty.

2. If the defendant used insulting language to Shankle after he had unfastened the cow, with the gun on his arm, but did not present it or offer to use it, and did not put the prosecutor in fear by his action and threats and cause him to change his course, he would not be guilty.

3. If Shankle went out, after defendant had released the cow, to a place where he had a right to be, and the defendant stood face to face with him and used the threatening and insulting language, having his gun loaded, with one barrel cocked and the finger on the trigger, and the defendant, by his threats and actions, put Shankle in fear and caused him to leave sooner than he would otherwise have done, he would be guilty of an assault, though he did not level the gun at the prosecutor.

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There was other testimony which we have not reproduced, because the exception pressed before us is, that in no aspect of the evidence was an assault committed, and this requires the presentation of the case upon the testimony most favorable to the State. If upon any state of the facts the jury were warranted in finding an assault, there was no error in finding the first instruction affirmatively.

Do the facts, as represented in the testimony of the prosecutor, constitute a criminal assault?

“It is difficult in practice,” says PEARSON, C. J., in *State v. Myerfield*, Phil. 108, reiterating the language of GASTON, J., in *State v. Davis*, 1 Ired. 1, 125; s. c., 37 Am. Dec. 535, “to draw the precise lines which separate violence menaced, from violence begun to be executed, for not until these lines are passed can there be an assault.”

In this case the defendant was with a pistol in his hand, sometimes bearing upon the prosecutor and sometimes not, and swearing that if the latter came in he would shoot him. Meanwhile the prosecutor was walking to and fro in the street opposite the defendant's grocery, threatening to whip the defendant if he came out. The court held that the use of the deadly weapon in brandishing it about, and occasionally presenting it at the defendant, although qualified with a condition which he had not the right to impose, was not by the explanatory words divested of its character as a criminal offense, and “that an offer to strike with a deadly weapon cannot be thus explained.”

In *State v. Morgan*, 3 Ired. 186; s. c., 38 Am. Dec. 714, one Cantwell, a constable, had under an execution seized a gun of the defendants, and had it in possession in his yard when the latter came up with an uplifted axe in his hands, and within striking distance, demanded its return or he would strike. The gun was not delivered up, but a parley ensued and an arrangement was made. This was declared to be an attack begun, and it was not less so because not carried into complete execution, the principle being that such a use of a deadly weapon to enforce performance of some required act, when the act is done, is itself an assault.

In *State v. Hampton*, 63 N. C. 13, the prosecutor was passing down the steps of the court-house, when he encountered the defendant, who turning himself about within reach and with his right hand clenched, his right arm bent at his side, but not drawn back said, “I have a great mind to hit you.” He had previously

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threatened to cow-hide the prisoner if the crowd would go with him. In consequence, the prosecutor turned away and passed out by another doorway. This violent obstruction offered to the prosecutor's passing out, compelling him to seek other means of egress from the building, was held to be an assault.

In *State v. Church*, 63 N. C. 15, the facts were these: The defendant and some others, on a day of public worship, were sitting outside the church some six or seven steps distant, when the prosecutor appeared. The defendant spoke to him thus: "We have no use for you in this company—go back, you shall not come here." The prosecutor stopped, when defendant rose to his feet and said, addressing the prosecutor, "I have a pistol," at the same time placing his hand on it, where belted around his body. The prosecutor retired slowly, followed by the defendant, not over ten steps apart, who urged him to go or he would shoot him, and drew the pistol from its scabbard, but did not cock it nor present it toward the prosecutor.

The court below held this to be no assault, but this ruling was reversed on the appeal, and READE, J., for the court says: "An offer of violence is an assault, even if it be accompanied with a declaration that violence will be forborne upon a condition, which the actor had no right to impose."

The rule deducible from these adjudications seems to be, that where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposed to do, and may lawfully do, by a display of overawing physical force, as in the brandishing of deadly weapons with violent threats of using them, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person is intimidated and desists, these acts constitute an assault.

The case before us may not possess all the constituent elements found in those referred to, yet we think it may be fairly brought within the scope of the general principle which they establish. The prosecutor, if we accept his version of the matter, was the owner and in lawful possession of the cow, she being secured near the store where he was present. The defendant removed the fastening, and was, while backing himself, driving the cow away, while with his face to the prosecutor, the gun in his hand cocked and one finger upon the trigger, he declared to the prosecutor his intent to blow out the brains of any one, who interfered and laid hands upon the

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cow. In answer to an inquiry as to what he meant, he says to the prosecutor in words of equal violence and indicating a murderous intent upon himself in carrying out his purpose, "I mean to die and go to hell in a few minutes." In consequence of these demonstrations of menaced violence if interrupted, the prosecutor forbore to pursue and take his cow, returning into his store. The cow was then carried away.

This, we think, is more than violence threatened, it is violence begun, and made successful by the overawing effect produced on the mind of the prosecutor. The gun, though not pointed, was held in a position admitting of instant use, and the purpose to use it, even to the death, manifested by both language and conduct, and thereby the prosecutor was prevented from asserting his right and regaining his possession.

As the jury may have taken this view of the testimony, it would have been erroneous to tell them if they believed the evidence, that is, the testimony of any of the witnesses, the defendant was not guilty.

We see no error in the direction as to what facts, if found by the jury, would constitute the offense charged.

There is no error, and this will be certified to the end that the court below proceed to judgment.

No error.

Judgment affirmed.

DES FARGES V. PUGH.

(98 N. C. 31)

Sale — fraud — insolvency.

Where one knows himself to be insolvent, and buys goods on credit, concealing that fact and intending not to pay, and falsely representing himself to be a mayor, the seller may recover the goods from him. (*See note, p. 449.*)

CLAIM and delivery. The opinion states the facts. The defendant had judgment below.

R. B. Peebles, for plaintiff.

ASHE, J. The action is claim and delivery, and the demurrer filed by the defendant raises the only question for our considera-

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tion, which is, does the complaint state facts sufficient to constitute a cause of action? and the special grounds assigned are:

I. That the complaint and affidavit and pleading of plaintiff do not show fraud.

II. That they do not allege such fraud, if any, as entitles her to the remedy she seeks.

III. No such fraud is alleged as to prevent the title to the property passing to the defendant.

We are of the opinion his honor committed an error in sustaining the demurrer.

The first ground assigned that the complaint does not show fraud, should not have been sustained for the reason that the demurrer for the purpose of the action admits all the allegations of fact contained in the complaint; and it is alleged that the defendant in his letter ordering the books represented himself as mayor of Windsor, and that he practiced law in the counties of Bertie, Martin, Washington and Northampton, which representations were untrue, and that he was utterly insolvent; that by such fraudulent representations and writings he deliberately intended to cheat, defraud and trick the plaintiff out of her said property, and that she was induced to give him possession of said goods by reason of his said representations to her that he was mayor of Windsor. These facts taken to be true, as they must be under the pleadings, are certainly some evidence of fraud.

The second and third grounds of the demurrer may be considered together, for if there was such fraud as entitles her to the remedy she seeks, there was such fraud as prevents the title to the property from passing to the defendant.

It is well settled that property in goods does not pass by a sale which the vendor has been fraudulently induced to make, unless he declines to assert his right to disaffirm the contract—in which case the property does pass—for the sale is voidable and the vendor has his election to sue for the price, or bring trover or detinue, under the former practice, or claim and delivery under the present system. *Benj. Sales*, 342–343; *Donaldson v. Farmer*, 93 U. S. 361; *Wilson v. White*, 80 N. C. 280.

It is held, and we think the current of authority is to that effect, that the mere fact that the buyer of property is to his own knowledge insolvent at the time of his purchase and conceals that fact from the vendor, is not ground for relief to the vendor, but it is

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otherwise if he actually misleads the vendor. "Mere insolvency cannot be treated as fraud; there must be fraudulent intent." Bigelow Frauds, pp. 36-37.*

A leading case on this subject is that of *Donaldson v. Furwell*, 93 U. S. 631, where Justice DAVIS, speaking for the court, says: "The doctrine is now established by a preponderance of authority, that a party not intending to pay, who as in this instance induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent party has acquired an interest in them, to disaffirm the contract and recover the goods." And he cites a number of authorities, both English and American, to support his position. This decision does not militate against the doctrine as laid down by Bigelow, *supra*, for Justice DAVIS does not hold the mere concealment of the buyer's insolvency is sufficient for the vendor to annul the sale, but the concealment must be coupled with the intent not to pay for the goods. The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it. In the cases just cited, the buyer bought the goods and went into bankruptcy very soon thereafter, and that fact was left to the jury to be considered by them in determining upon the question of fraudulent intent. To the same effect is the case of *Wilson v. White*, *supra*.

We think the principle to be deduced from the authorities is that in addition to the mere fact of concealment of his insolvency on the part of the buyer, he must be shown to have done some act attending the sale or soon thereafter, as tends to show that at the time of the sale he had the preconcerted design of not paying for the goods, *Wilson v. White*, *supra*, or to have practiced some deceit which put the vendor off his guard and induced him to part with his goods.

It matters not, it is held, by what means the deception is practiced, whether by signs, by words, by silence or by acts, provided that it actually produce a false and injurious impression of such a nature that it may reasonably be supposed that but for such de-

* To this effect, *Morrison v. Shuster*, 1 Mackey, 190; *Kelsey v. Harrison*, 29 Kans. 143; *Talcott v. Henderson*, 81 Ohio St. 162; s. c., 27 Am. Rep. 501.—
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ception the vendor might never have entered into the contract. Story Sales, 153, 154.

Now apply these principles to our case. The vendor resides in Baltimore and the defendant in North Carolina. He was an entire stranger to her. He ordered a small number of books and falsely represented himself as the mayor of a town and a lawyer practicing in three or four counties. She alleges that she was induced to send him the books by reason of his representation to her that he was a mayor. He promised to pay in thirty days—was insolvent and concealed that fact from her. It is true the fact of his being mayor or even a practicing lawyer was no evidence of his ability even to pay so small an amount as that sued for, but it was some evidence of his social standing in the community where he resided, and that he was at least a man of integrity, for it is hardly to be presumed that any community would appoint a man to the respectable position of mayor who was tricky and dishonest. The fact then that he was mayor of Windsor, if true, would raise a presumption that he was an honest and upright man, and it is, we know, not unusual for credit for moderate amounts to be given to impecunious persons merely upon the ground of their honor or supposed integrity—the vendor trusting to their honesty rather than their ability to pay.*

We are of the opinion the facts as stated in the complaint were sufficient to raise a question of fraudulent intent, that constituted a proper case for the determination of the jury, and the demurrer should therefore have been overruled.

The demurrer is overruled and the judgment rendered by his honor in the court below reversed, and the case is remanded that the defendant may answer the complaint if he should be advised so to do.

Error.

Reversed and remanded.

NOTE BY THE REPORTER.—See *Belding v. Frankland*, 8 Lea., 67; s. c., 41 Am. Rep. 680; *Brower v. Goodyer*, 88 Ind. 572. Where a person orders goods knowing himself to be insolvent, without disclosing his insolvency, and with the preconceived purpose of not paying for them at all, or at most only a very small per cent, and with further preconceived purpose of having them swell his assets for the benefit of those whom he intends to make his preferred creditors, the purchase is fraudulent, and the vendor, upon discovering the fraud.

* See *Higler v. People* (44 Mich. 399), 88 Am. Rep. 267; “storekeeper.”—REP.

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may rescind the contract, and take the goods as against the vendee. *Lee v. Simmons*, Wis. Sup. Ct., March 16, 1886.

In *Brower v. Goodyer*, 88 Ind. 572, it was held that a vendee of goods who, knowing himself to be insolvent, conceals his insolvency from the vendor and buys the property on credit, not intending to pay for it, perpetrates a fraud which will entitle the vendor to disaffirm the control and replevy the property from his vendee. The court said: "Where a man, knowing himself to be insolvent, conceals his insolvency from the vendor of goods, and buys the property not intending to pay for it, he perpetrates a fraud which will entitle the seller to reclaim the property. The principle which rules this case is thus stated by the Supreme Court of the United States in *Donaldson v. Farwell*, 93 U. S. 631: 'The doctrine is now established by a preponderance of authority, that a party not intending to pay, who as in this instance induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. *Byrd v. Hall*, 2 Keyes, 647; *Johnson v. Monell*, 2 Keyes, 655; *Noble v. Adams*, 7 Taunt. 59; *Kilby v. Wilson*, Ryan & Moody, 178; *Bristol v. Wilmore*, 1 Barn. & Cress. 518; *Stewart v. Emerson*, 52 N. H. 301; Benj. Sales, § 440, note of the American editor and cases there cited.' In addition to the authorities there cited in the opinion from which we have quoted, we refer to *Henshaw v. Bryant*, 4 Scam. 97; *Patton v. Campbell*, 70 Ill. 72; *Donaldson v. Farwell*, 5 Biss. 451; *Seligman v. Kalkman*, 8 Cal. 207; *Bidault v. Wales*, 19 Mo. 36; *Dow v. Sanborn*, 8 Allen, 181; *O'Donald v. Constant*, 82 Ind. 212. A recent writer thus states the rule: 'In other words, a purchase on credit with a preconceived design on the buyer's part, formed at or before the purchase, not to pay for the thing bought, constitutes a species of fraudulent concealment.' 2 Pom. Eq., § 906."

BLACK V. WILMINGTON AND WELDON RAILROAD COMPANY.

(93 N. C. 42.)

Carrier — bill of lading — goods not received.

Where a carrier's agent issues a bill of lading for goods which were not delivered for shipment, the carrier may show the non-receipt even as against a *bona fide* transferee for value. (See note, p. 458.)

THE opinion states the case.

John L. Bridges, Jr., for defendant.

SMITH, C. J. The action is prosecuted for the recovery of the value of the undelivered cotton mentioned in the two bills of lading,

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upon the faith of which and under an arrangement with the consignor they made full advancements in honoring his drafts. It does not proceed upon an allegation of fraud practiced through the instrumentality of the defendant's agent, and made successful by means of the false bills of lading. We must therefore consider the case as resting upon contract or the common-law liabilities of carriers of goods for their safe transportation and delivery to the consignees and the failure of the defendant to do so.

The authorities cited and discussed in the well prepared brief of the defendant's counsel seem to sustain his proposition that the authority to issue such bills depends upon the actual delivery of goods, and if issued without delivery they do not bind the principal, and that this defense is open to the latter. Some of the authorities to this effect we propose to refer to.

"Except as against a *bona fide* transferee of the bills of lading for value," remarks a recent writer, "the carrier may contradict it as to the delivery to him of the goods, or as to their description, quality or condition." Abb. Trial Ev. 537, § 45.

Carrying the rule still further, Mr. Daniel, in his excellent work on Negotiable Instruments, vol. 2, § 1733, states it thus: "Although the bill of lading is signed by the master of the ship, his subscription is as agent for the owners, and the contract is binding upon them. But the master has no authority to grant a bill of lading unless the goods be actually received on board the ship, and if he transcends his authority in this respect, and the goods be not on board, the ship owners will not be bound by the bill, although it be transferred to a *bona fide* indorsee for value."

So it is said by the Supreme Court of the United States that the general owner is not "estopped from showing the real character of the transaction by the fact that libellants advanced money upon the faith of bills of lading." *Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. 7.

In like manner Mr. Justice DAVIS, delivering the opinion of the court in the *Lady Franklin*, 8 Wall. 327, and reiterating the doctrine, says: "The attempt made in the prosecution of this libel, to charge this vessel for the non-delivery of a cargo which she never received and therefore could not deliver because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here."

He adds: "In this case the bill of lading acknowledges the

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receipt of so much flour and is *prima facie* evidence of the fact. It is however not conclusive on this point, but may be contradicted by oral testimony."

Upon similar grounds are the rulings in this court which declare written acknowledgments of money received liable to contradiction by parol proof when no contract is formed by them, as in *Brown v. Brooks*, 7 Jones, 93; *Smith v. Brown*, 3 Hawks. 580, and other cases.

When no goods are placed in custody of the carrier's agent to transport, there is no subject-matter to support a contract, and hence no obligation is imposed by the receipt put in the form of a contract. There can be no conveyance unless there be something to convey, and therefore no breach of obligation or duty.

The result is that the defendant company has incurred no liability in this form of action by the bill of lading for eight bales given in May. Of them only two were delivered to the agent and they were consigned to the plaintiffs and received by them.

But the company is responsible for the failure to carry and deliver the ten bales mentioned in the bill of May preceding. These did pass into the possession of the agent, and although their first destination was fixed in the contemporary bills at Norfolk to a consignee there doing business, it was competent for the consignors to change this and direct transportation to the plaintiffs in New York. This new superseded the first contract and annulled all liability under it. The cotton being then in possession of the company, it was competent to issue the second bill and undertake to transport the goods to the plaintiffs at New York. This was a valid contract and was broken by the failure to carry to the plaintiffs, and instead conveying to the consignees at Norfolk under the superseded contract.

There is error in entering up judgment for six bales of cotton described in the last bill of lading, and the plaintiffs should have recovered on the value of the ten first delivered.

The form of the case agreed will not permit of a reform of the judgment, for it requires us to sustain it in its entirety or render judgment for the defendant. The aspect of the case as considered by us seems not to have been contemplated by the parties, and therefore reversing the judgment, we remand it for further proceedings in the court below.

Error.

Judgment accordingly.

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NOTE BY THE REPORTER.—In harmony with this case is *Balt., etc., R. Co. v. Wilkins*, 44 Md. 11; s. c., 22 Am. Rep. 26; but *Sioux City, etc., R. Co. v. First Nt. Bk.*, 10 Neb. 556; s. c., 35 Am. Rep. 488, is to the contrary. To the contrary also is *Brooks v. N. Y., etc., R. Co.* Pennsylvania Supreme Court, Oct. 5, 1885. Here the shipping clerk fraudulently issued a fictitious bill of lading, but the company was held estopped as to one who in good faith made advance on the credit of it. The court said: "Plaintiffs, who thus became the innocent victims of the fraud to the extent of several hundred dollars, claim that defendant, through whose shipping agent they were defrauded, should make good the loss.

"The claim appears to be both reasonable and just; and notwithstanding the authorities cited in support of the opposite view, we are satisfied it is so. Under the circumstances cited in the case stated, defendant is estopped from denying what its accredited shipping agent asserted in the bill of lading by which plaintiffs, without any fault on their part, were misled to their injury.

"A question has been raised as to whether, upon the facts presented, the law of this State or that of New York should govern in determining defendant's liability. We are not prepared to admit there is any material difference between the laws of the two States, applicable to the case, but if there is, we think it very clear that the law of New York must control, for the reason that the transaction took place in that State. The present case is virtually ruled by *Armour v. Michigan Central R. Co.*, 65 N. Y. 111; s. c., 22 Am. Rep. 608. The facts of that case, as stated in the opinion of the court, are not distinguishable in principle from those of the case before us.

"The same principle is recognized in *Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776, the facts of which were briefly these: The railroad company received a consignment of wheat, and issued therefor a delivery order which came into the hands of B., who obtained advances thereon from plaintiffs. Shortly afterward the company issued a second delivery order in respect of the same consignment of wheat. The two orders were different, and such as might be reasonably supposed to relate to distinct consignments. On the second order B. obtained further advances from plaintiffs, who were under the belief that the delivery orders related to distinct consignments. B. having afterward become insolvent, it was held that the company was estopped by the negligence of its agent from showing that the two delivery orders related only to one consignment, and that it was liable to compensate plaintiffs for the loss sustained by them through their advances to B.

"It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein had actually been given by the railroad company to Weiss, it was not in any manner responsible for his unauthorized act, even as to innocent third parties who were misled and injured thereby. We cannot assent to this proposition. As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but as between the principal and the agent, the true limit is the express authority of instruction given to the agent. *Evans Agency*, 594, 606; *Adams Express Co. v. Schlessinger*, 75 Penn. St. 246. The principal is bound by all

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the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions; and this is expressly the case with officers and agents of corporations. Since a corporation acts only through agents, it is bound by its agent's contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority. Whart. Cont., §§ 96, 180, 269. The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent. Evans Agency, 193, note. These elementary principles are founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in that matter, should be bound by it. Evans Agency, 591. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods, but it puts Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule."

BURWELL V. COMMISSIONERS OF VANCE COUNTY.

(98 N. C. 73.)

Nuisance — jail

An injunction will not issue to prevent the erection of a jail on the ground of nuisance.

SUIT for injunction to prevent the erection of a jail. The opinion states the point.

D. G. Fowle and E. C. Smith, for plaintiffs.

C. M. Cooke, for defendant.

SMITH, C. J. Two inquiries arise out of the contention of the parties which may be considered in determining the controversy.

I. Is a public jail a nuisance in a legal sense that persons residing on lots near or adjoining thereto may obtain an order to prevent its construction from the court; and

II. Are the board of commissioners restrained by the act creating the county from putting it anywhere else than upon the courthouse lot?

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1. The jail being a public necessity, indispensable in the administration of justice, and therefore required to be built, cannot in itself be a nuisance in the sense of the law, *per se*, though its mismanagement may render it obnoxious to those who live or do business near it, since in such case private convenience and comfort must yield to the common good. Assuming a discretion reposed in the commissioners in fixing the location of this house and their use of all proper means to render it, as far as practicable, inoffensive and not injurious to surrounding and near residents and places of business, those who occupy such could not rightfully claim the interposition of the court to prevent its being built. For if they could thus have the aid of the court, so could residents of any other part of the town, for the same and perhaps stronger reasons, because more thickly settled as well as contiguous proprietors could prevent the erection elsewhere. The special damage in such case is incidental to what the general interest of the community requires and becomes *damnum absque injuria*. Otherwise no jail could be built within the town, if parties interested as these plaintiffs choose to object. All that can reasonably be required is, that the construction and management afterward be such as to occasion as little inconvenience and discomfort to those living near as is consistent with the public purposes to be subserved, and nothing of the kind is suggested in the statement of grievances in the complaint. They are such only as would be objected with equal force to prevent any other location of the structure. In the forcible language of the late chief justice, in *Hyatt v. Myers*, 73 N. C. 232, quoted upon a somewhat similar application in *Dorsey v. Allen*, 85 N. C. 358; s. c., 39 Am. Rep. 704: "If a man instead of contenting himself with the quiet and comfort of a country residence choose to live in a town, he must take the inconveniences of noise, dust, flies, rats, smoke, soot, cinders, etc., and he cannot complain of the owner of an adjoining lot, by reason of the smoke, soot and cinders, * * * caused in the use and enjoyment of his property, provided the use of it be for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors."

The structure complained of is not merely a public necessity, but is required by the act to be built within the corporate limits of the town, and unless restrained in the act, its location is left to the sound discretion of the commissioners, over which the court has not

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control, and if it had, the wisdom with which it has been exercised seems to have been fully sustained by the testimony.

While it is conceded that the present action could not be maintained if the selection of the place was within the authority conferred, or if not, aside from the alleged special damage threatened, the commissioners could only be restrained from going beyond its limits by a proceeding instituted by the State and its agents for the public, it is contended, that being not only in excess of power but in disregard of the statutory mandate, the erection of the jail where it is proposed to be put is a tort, attended with positive and direct injury to the plaintiffs, for which the law does afford them the redress demanded in the action. We are thus brought to an examination of the statute to see if its terms are thus mandatory and restrictive.

If the "other necessary buildings" associated with and following the designation of a court-house, as mentioned in both sections 8 and 14, are to be understood in their most comprehensive import, it would require to be crowded upon one lot, the poor-house, house of refuge and a public hospital, should these latter two be deemed necessary, and it is quite manifest this was not within the contemplation of the act, nor were they intended to be built only in the town, so unsuitable in the attainment of the beneficial fruits of such structures. Code, § 707, ¶¶ 17, 21, 22.

The counsel for appellants restricts these words so far as to confine them to such buildings as may be needed, as offices for county officers whose business is more immediately connected with that for which the court-house is built; but insists that the jail designated by name in section 14 must be on the same lot with the court-house, and this by force of the words "to build thereon," that is, on the site for the court-house and necessary buildings, a public jail for said county. In our construction of the act and in furtherance of its manifest intent, the term used, "site," must be understood in a disjunctive sense and as applying separately to the different county buildings to be constructed, and which must not be outside the town limits. The section should be read as directing the selection of a *situs* or place for the court-house and a site or place, one or more, for the other public buildings embraced in it, as the public convenience may require, and this is left to the judgment of the commissioners. As they could accept and use contiguous lands or land just across the public street, so may they select a more distant

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lot when demanded by a due regard to the public welfare. This construction is fortified by the bestowal of all the powers possessed by other county commissioners, not restricted in the act itself. So in section 14 they are required to build a jail on the site selected for that purpose in the town and not necessarily in the court-house lot. No new restraints are here imposed and it only confers authority to purchase the site or sites required by section 8, and to erect the houses required for the public use thereon according to their judgment.

The plaintiffs also insist upon their right to preserve the present *status* until a final hearing and adjudication of their case. To this a ready answer is suggested in the necessity of having a jail and the mandate for its construction. Delay would be a dereliction of duty, and to this the court ought not, by its needless intervention in the controversy, to become a party.

Besides the supposed injury, at least in its extent, is largely conjectural, as the various opinions expressed in the affidavits show, and if entitled to relief, it can be obtained when they become facts. But our construction of the sections conferring power removes the objections arising upon the alleged want of it.

If we were at liberty to revise the discretion reposed in the commissioners in selecting the site for the jail, as we are not, the evidence largely preponderates in showing that it has been exercised wisely and in a proper regard to the interests of the property owners and residents of the town.

As we refused in *Dorsey v. Allen, supra*, to arrest the work commenced in the erection of a planing mill and cotton-gin because of its apprehended annoyance and increased danger of fire, upon considerations of public policy, so for stronger reasons must we refuse to arrest the action of the defendants in their discharge of a public enjoined duty. There is no error. Let this opinion be certified to the court below, that it may proceed upon the affirmed judgment with the cause.

No error.

Judgment affirmed.

WALL V. WILLIAMS.

(98 N. C. 387.)

Contract — for "support."

A contract for "plenty of support" includes attendance and nursing in a prolonged sickness.*

ACTION for services. The opinion states the point. The defendant had judgment below.

Scott & Caldwell, and W. S. Ball, for plaintiff.

M. S. Robbins and J. T. Morehead, for defendant.

ASHE, J. The only question presented for our determination arises upon the construction of the contract between the plaintiff and the testator. The plaintiff contends that the word "support" as used in the instrument, can only be interpreted as meaning "food or provisions," and the defendant insists that the word is not to be construed in any such restricted sense, but the use of it in the contract was intended to comprehend a reasonable and comfortable maintenance, suitable to the estate, the mode of living, and the habits of life of the person to be supported. When the case was before us at a former term, 91 N. C. 477, it was then said in the opinion delivered by SMITH, C. J.: "Are not the service and attention incident to those being supported, though in the present case they were far more onerous than perhaps ever contemplated by either party? Would a total neglect of the most common wants when living on the same farm be consistent with the agreement for a support to be afforded by the plaintiff? Is the word to be construed as restricting the contract to the furnishing of food merely and fuel for cooking and warmth?"

The point now involved did not necessarily arise there, but it will be seen from the above extract that the court leans to the construction now contended for by the defendants, and after further consideration of the subject, we think that is the proper construction of the instrument.

The plaintiff's stipulation in the contract is to furnish "plenty

**Contra*: *Grant v. Dabney* (19 Kans. 388), 27 Am. Rep. 125.

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for to support" Daniel Williams and his wife, and he, S. W. Wall, is "to have all he can make after we get our support."

It certainly was not contemplated by the parties that the land should be sown or planted in grain. Wall, under the contract, might have sown cotton or tobacco, in which case he would be bound by the contract to furnish a support out of the proceeds of the crops. It is not a stipulation for a certain part of the crops, or for a support out of the premises — the corn or grain raised on the land. The defendant by the contract is entitled to a support — a plentiful support. What does that mean? According to Webster it means "maintenance, subsistence, or an income sufficient for the support of a family," and maintenance means "sustenance, support by means of supplies of food, clothing and other conveniences." And this liberal construction of the word support in its use with regard to persons who have been contracted with for their maintenance, was held in the case of *Whilden v. Whilden*, Riley Law and Equity, 205. There the property of a testator was directed to be sold, and the money invested in bank stock, for the support of his children, until the youngest should come to the age of twenty-one, and he left several children who were of age, and others minors; it was decided as the income was small, it should be applied to support and educate the minor children. We cite this case to show that support is held to mean something more than mere food.

The only other case we have found bearing on the question is another South Carolina decision, *Ellerbe v. Ellerbe*, Spears Eq. 328. There a "reasonable and competent support" was provided for the testator's daughter and grandson. The court held, that as she had an ample estate of her own, she could not get a support out of the estate of the testator, William Ellerbe. The court held in its opinion, that a reasonable and comfortable support was such "maintenance as was necessary, suitable and proper, in the situation of the party," and in support of his position the chancellor, who delivered the opinion, cited the case of *Whilden v. Whilden*, *supra*. The stipulation is to "furnish a plenty for to support Williams and his wife." Plenty is from the Latin *plenus* — full. Plenty of support must mean a full support — not merely sufficient provisions, but according to the definition and the authorities cited, "in full;" such other conveniences and necessities as were reasonable and suitable to make Williams and his wife comfortable. If it turns

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out that he made a bad bargain, which does not seem to have been the case, he had no right to complain. He went into it with his eyes open. He knew that he, Williams, was old and feeble, and had passed by a decade the scriptural limit of human life, and was likely to be afflicted with the maladies incident to old age. If these maladies were greater, or more offensive than he had expected or hoped, he must be held to abide the consequences of his contract.

There is no error. The judgment of the Superior Court is affirmed.

No error.

Judgment affirmed.

TAYLOR V. TAYLOR.

(98 N. C. 418.)

Marriage — divorce — alimony — dower.

A decree in an action for a limited divorce that the husband shall pay a gross sum to the wife and be discharged from all further liability for her support does not bar dower.

ACTION for dower. The head-note states the point. The plaintiff had judgment below.

J. A. Forney, for plaintiff.

ASHE, J. The judge on the appeal from the clerk sustained his judgment in overruling the demurrer, but omitted to adjudicate upon the question whether the defendants upon overruling the demurrer had the right to answer the complaint, so that the only question presented by the record upon the appeal from the judgment of his honor is, was there error in his judgment in sustaining the judgment of the clerk?

The defendant's counsel contended that by the decree of divorce a sum in gross was awarded the plaintiff, which was paid by the husband, and accepted by her in full satisfaction of her claims on him for the maintenance, support and provision, and as dower is given for the maintenance, support and sustenance of the wife, the husband's estate was discharged from all further liability for her support, and consequently his estate was discharged from her claim of dower.

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This contention is founded on a mistaken notion of alimony, and the relative rights of husband and wife upon a divorce *a mensa et thoro*. Alimony in its legal sense may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to the wife for her subsistence and livelihood during the period of their separation. Shelford Marr. and Div. 586. "It is not a sum of money, or a specific proportion of the husband's estate, given absolutely to the wife; but it is a continuous allotment of sums, payable at regular periods for her support from year to year." 2 Bish. Marr. and Div., § 427.

Instead of the allotment of a certain sum to be paid from year to year, the decree in the case referred to in the pleadings gave the plaintiff a sum in gross, which she consented to take in lieu of all future allotments, and the husband was thereby discharged from any liability to be charged with any other sums for her support during their separation. That is so clearly the meaning and effect of the decree, that we cannot conceive how any other construction could be put upon it.

The property rights of the parties separated remain in general unchanged. The only exception to this is that she may hold during the separation, as a *feme sole*, any such property as she may acquire by her own industry or the donations of her friends. Such is held to be her own property, which she holds against her husband and his creditors, and may dispose of as if she were a *feme sole*. But when the alimony is allotted out of the specific property of her husband, she acquires no such right, but the property continues in the husband and will revert in possession to him upon her death or reconciliation.

For it is given to her until a reconciliation, and notwithstanding the divorce the husband will be entitled to his curtesy in her lands and the wife to dower in his, just as if there had been no divorce; and the husband would still have the right to reduce her choses in action into possession and upon her death administer upon her estate, Schoul. Dom. Rel., § 222, and the wife can not only claim her dower upon the death of her husband, but claim her distributive share of his personal estate in case he dies intestate. 2 Scrib. Dower, 615; Bish. Marr. and Div. *ibid.*; 2 Bl. Com. 130. But we need not go out of our own State for authority upon the subject. In *Rogers v. Vines*, 6 Ired. 293, Chief Justice RUFFIN, who delivered the opinion of the court, has given a very full and

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clear exposition of the law appertaining to the legal rights of husband and wife during a separation under a decree of divorce *a mensa et thoro*.

Speaking of alimony, he said: "In its nature then it is a provision for a wife separated from her husband, and it cannot continue after reconciliation or the death of either party. There is no occasion for it after the death of the husband, for she then becomes entitled to dower and a distributive share, though divorced *a mensa et thoro*, unless indeed she should lose dower by leaving her husband and living in adultery. Co. Lit. 82, 33. Moreover the decree for alimony vests in the wife no absolute right to the allowance, whether it consists of money or specific things; for besides that it ceases upon reconciliation, it may be changed from time to time, and reduced or enlarged at the discretion of the court.

There is no error in the judgment of his honor in sustaining the judgment of the clerk in overruling the demurrer, but the clerk was in error in refusing to allow the defendants to answer, after overruling their demurrer. The cause must therefore be remanded to the Superior Court of Rutherford, that the defendants may answer the complaint of the plaintiff, should they still be advised so to do.

Error.

Remanded.

GRAY V. WEST.

(33 N. C. 442.)

Will — legacy — not charged

Where a will devises land to A., and provides that B. shall "have her support out of the land," the legacy is not a charge on the land.*

ACTION to charge a legacy on land. The opinion states the case. The plaintiff had judgment below.

Clement & Gaither, for plaintiff.

D. M. Furches, for defendants.

*But see *Thayer v. Finnegan* (134 Mass. 62), 45 Am. Rep. 285; *Knotts v. Bailey* (54 Miss. 235), 28 Am. Rep. 348.

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MERRIMON, J. It appears that James Gray died in the county of Davie in the early part of the year 1873, leaving surviving him neither wife nor children, and leaving a last will and testament, which was duly proven, and James Gaither qualified as executor thereof.

By this will the testator disposed of considerable estate, consisting of both real and personal property. The parts of the will to be construed and necessary to be set forth here are as follows:

"9th. I give Margaret Forcum and Emily Clampet and Mary Clampet, the land I now live on and all my property that I have on the land.

"10th. Arey Gray is to have her support out of the land.

"11th. I give Milly Gray and her children one mule, one cow, five sheep. Turner Gray is to tend the land and keep the fences up by giving the third of the produce."

The *feme* defendants are the persons named in the ninth clause of the will above recited, Emily Clampet having, since the death of the testator, intermarried with the defendant David West, and Mary Clampet with the defendant John Johnson.

The *feme* defendants, as was admitted, were the natural children of Alexander Gray, deceased, who was the brother of the testator, and after the death of their father they lived with and were cared for by the testator, as if they had been his own children, until the time of his death.

Arey Gray, the plaintiff, mentioned in the tenth clause of the will, had been a faithful slave of the testator in time past, before his death, and she was advanced in life and somewhat infirm. It appears that she had some means of support of her own, but not sufficient to make her comfortable.

On the argument before us the counsel for the plaintiff insisted that the "support" provided for her in the will must be treated as a charge, a lien, on the land, and it might be sold to pay arrearages for her support, as directed by the judgment of the court below, and cited numerous cases, none of them however directly in point, to support the view contended for by him.

In interpreting wills, it is the duty of the court to ascertain and give effect to the intention of the testator. Technical rules of construction, and decided cases, serve only as aids rather than as binding rules in the discharge of such duties; the meaning of every will and its several parts depends largely upon the circumstances of

the testator as these appear from the will itself. The meaning attributed by him to words and phrases, when it appears, must prevail, however different this may be from that ordinarily implied by such words and phrases in other wills or other written instruments. The sole and controlling purpose is to ascertain what the testator whose will may be under consideration intended.

It is plain in this case, that the testator intended by the ninth clause of his will, as his principal purpose, to devise to the *feme* defendants the tract of land, the whole of it, on which he lived at the time of his death. The terms employed are broad and strong and without qualification.

By the tenth clause he did not devise any part of the land to the plaintiff, but made a provision that she should "have her support out of it."

This provision does not imply that she might have the land sold, or parts of it, from time to time, so that she might, from the proceeds of such sales, get her "support" out of it; it was no part of the purpose to make the provision, the "support," a lien upon the land, and subject it to sale. Such an interpretation would tend to defeat, and might possibly defeat the chief and primary purpose of the testator, to devise the land to the *feme* defendants, and this cannot be allowed if a more reasonable one can be given. It seems to us that the obviously reasonable interpretation of the two clauses mentioned is, that the testator intended to provide that the plaintiff should have her support out of the net annual product, the rents and profits of the land, that out of these she should get her "support;" no matter who might make or receive them, the support was intended to be a charge upon them, and she had the right as against the executor, who it seems received them until 1878, the defendant or any other person to have so much thereof as might reasonably be necessary for that purpose. Her right was not against the *feme* defendants, at all events it was only so in case they made or were receipts of the rents. It was not the intention that the plaintiff should get her "support" from them, but "out of the land," that is, out of the rents of it or the use or occupation thereof. She misapprehended her right in looking to them, instead of the rents directly, whether in their hands or in those of the executor or some other person.

This view is strengthened by the provision in the eleventh section of the will, that "Turner Gray is to tend the land and keep the

fences up by giving the third of the produce." The testator thus recognized and treated the lands as productive of rents, and as affording from year to year means—"produce"—out of the land for the "support" of the plaintiff, as well as for the purposes under the will.

If it had turned out that for any cause neither *feme* defendants, nor the executor, nor any other person would cultivate the land and make rents, so that the plaintiff might have her "support" out of the same, in such case she might have her remedy through the courts.

The court might have directed the land to be leased for cultivation so as to make rents, or she might have been allowed to cultivate it or a sufficient part of it herself, as the court might allow; or she might have had such relief as the court would deem her entitled to.

The will does not specify any particular sum of money or supplies of any kind for the "support" of the plaintiff. The supply, whatever it might be, was left to depend upon her wants growing out of her physical condition and her circumstances, pecuniary or otherwise. It was not intended that she should receive annually, or at shorter intervals, a sum of money or other suitable supplies, whether she needed them for her support or not—nor was it intended that her estate should be enhanced, or that she should have a legacy at all events equal to a sum of money sufficient for her "support." The purpose was that she should have a "support out of the land" equal to the supply of her reasonable wants and necessities, in view of her condition and station in life. The provision was for her personally—not for others that might be about and dependent more or less on her.

If she had abundance, it might be questionable whether or not she could get any thing "out of the land;" if she had not enough for her comfortable "support," then the deficit must be supplied, and the supply would depend upon her reasonable wants; if she were homeless, she would be entitled to be supplied in a proper way with a comfortable place to live; if she were stout and strong, her demands would be less; if she were infirm, helpless, sick, then she would be entitled to more. If those interested in the land would not supply such measure of comfortable support, then the court would allow it out of the rents of the land. She might have applied for redress long ago—that she did not, was her own neglect or her

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misfortune; if she accepted promises from the *feme* defendants that were broken, that was also the fruit of misplaced confidence. The courts were open to her at all times. *Wall v. Williams*, 93 N. C. 327; *Ellerbe v. Ellerbe*, Spear's Eq. (S. O.) 328; s. c., 40 Am. Dec. 623.

It follows that the support to which the plaintiff was entitled was not a charge upon the land in the sense and way contended for by her, and it further follows that the *feme* defendants were not amenable to her for her "support" for the time they did not receive the rents and profits thereof. The judgment is erroneous and must be reversed and further proceedings had in the action in the court below in accordance with this opinion. To that end let it be certified to the Superior Court. It is so ordered.

Error.

Judgment reversed.

STATE V. VINES.

(93 N. C. 493.)

Criminal law — homicide — negligence — evidence — opinion.

Where one unintentionally kills another by the careless use of a pistol in sport, it is manslaughter, although the victim told him to shoot.*

A witness may not give his opinion whether a shooting was accidental.

CONVICTION of manslaughter. The opinion states the facts.

Attorney-General, for State.

Hugh F. Murray, for prisoner.

MERRIMON, J. The court instructed the jury, that if they should believe the evidence, the prisoner was guilty of manslaughter. They rendered a verdict of guilty of that offense, and it must be taken that they believed the evidence, and if they did, it is manifest that the prisoner was at least guilty of manslaughter. If it be granted that he and Hines were in jest and rough sport, and this is by no means certain, he was using a dangerous weapon, a loaded pistol, knowing that it was loaded, not only incau-

* See *Robertson v. State* (2 Lea, 289), 81 Am. Rep. 602; *State v. Emory* (78 Mo. 77), 47 Am. Rep. 92.

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tiously, but in a most reckless and unlawful manner. He had it pointed at Hines, who fell behind the deceased, saying as he did so, "shoot and be damned," when at once he fired the fatal shot. If he did not intend to kill Hines, and the discharge of the pistol was unintentional, still the killing was manslaughter, because in any view of his conduct he used the dangerous weapon carelessly, recklessly and unlawfully. It is clear, that where one, engaged in an unlawful or dangerous sport, kills another by accident it is manslaughter. Arch. Cr. Pl. 397; Fost. Cr. Law, 259, 260, 261; 1 Hale Pl. Cr. 472, 473; Ros. Cr. Ev. 687, 688; *State v. Shirley*, 64 N. C. 610; *State v. Roan*, 2 Dev. 58. This however would not be so, if the sport were lawful and not dangerous; in such case it would be no more than homicide by misadventure. There is a variety of cases in which a person, causing the death of another, without intending to inflict injury, is criminally responsible, though not under the circumstances chargeable with murder. In such cases the test of responsibility depends upon whether the conduct of the party accused was unlawful, or not being so, was so grossly negligent, reckless or violent, as necessarily to imply moral impropriety or turpitude. In some cases it may be difficult to determine the grade of the offense, but the case before us leaves no ground for doubt or hesitation in determining that it is at least one of manslaughter; indeed in one aspect of the case it was murder. There was some evidence going to show the willful purpose of the prisoner to shoot without regard to the consequences, and if this purpose existed, it was murder.

The prisoner's counsel proposed to ask the witness, "if he regarded the shooting as accidental?" Upon objection the court would not allow the question to be put, and this is made a ground of exception.

The question was properly excluded, because first, the opinion of the witness was not competent evidence, and secondly, it was immaterial.

Generally the court or the jury, as the case may be, as the triers of questions and issues involving the ascertainment of facts, reach their conclusions from the facts in evidence before them, and not from the opinions of witnesses. There are well defined exceptions to this general rule, but these do not affect this case, and need not be stated here. If in some possible cases the opinion of a non-expert may be competent evidence, as ingeniously contended by the

counsel for the prisoner in his very interesting brief, this is clearly not one of them. The facts of the case were plain, clear and distinct, and the witness, by a simple recital of them, put the court and jury in full possession of them and the circumstances attending the homicide, and they were as competent to judge whether or not the shooting was accidental as the witness. There is nothing in the case that warrants a departure from the general rule of law that excludes such evidence.

If the facts testified to, were not stated with sufficient fullness of detail, the prisoner might have elicited them by a proper cross-examination of the witness, in which case the jury could have drawn proper inferences from them without the opinion of the witness. There was no necessity for the opinion of the witness in order to give the jury facts they could not get otherwise than by his opinion.

The opinion of the witness was also immaterial. If he had been allowed to say that in his opinion the shooting was accidental, this could not have materially changed the case, because the prisoner had used the loaded pistol in an unlawful and reckless manner, and whether the firing was accidental or not, made no difference. The law does not tolerate such use of dangerous weapons, and when fatal consequences result from it, the offender cannot be held guiltless; in such case he must answer for the consequences. It would be monstrous and shocking to reason to allow a man to so use a loaded pistol, and then take shelter behind the fact that the firing was accidental.

[Omitting a minor point.]

In our judgment, the prisoner has not the slightest ground of complaint at the verdict of the jury, or the action of the court. Indeed it is fortunate for him that he was not convicted of a more serious offense.

There is no error. To the end that judgment be rendered and further proceedings may be had in the action, let this opinion be certified to the Superior Court according to law.

No error.

Judgment affirmed.

State v Miller.

STATE V. MILLER.

(38 N. C. 511.)

Statute — "drummer."

A merchant, having a fixed place of business, and there selling a single lot of goods, consigned to him from another State and already paid for by him, to a resident of the same place, is not a "drummer."*

THE opinion states the case.

Attorney-General and Read, Busbee & Busbee, for State.

Bynum, Bynum & Shipp, for defendant.

SMITH, C. J. The offense with which the defendant is charged is a violation of section 28, chapter 175 of the acts of 1885, entitled an "Act to raise revenue," such parts and so much of which as are material in passing upon the appeal are as follows:

"Every person acting as a drummer in his own behalf, or as agent for another person or firm, who shall sell, or attempt to sell goods, wares or merchandise of any description, by wholesale, with or without samples, shall before soliciting orders or making any such sales pay to the State treasurer a tax of \$100 and obtain a license which shall operate one year from its date, and shall be exempt from any other license tax, either State, county, city or town. * * * Any person violating the provisions of this section shall be guilty of a misdemeanor, and shall be fined not less than \$200, or imprisoned not less than ninety days," etc.

While the defendant as a general cotton and commission merchant in association with his sons, and under the partnership name of R. M. Miller & Sons, is conducting a regular and recognized business in Charlotte, upon which he pays all the taxes imposed under the revenue law, he is sought to be made responsible as a "drummer" under another clause of the act, though not so designated in the charge, for the single act of selling a consigned and paid-for lot of flour sent from a distant State.

We think few persons in reading the statute and noticing the different classes of employment or occupation there assessed would

* See 38 Am. Rep. 336.

regard the act of the defendant as a "drumming," and the defendant as a drummer, within the purview of the section upon which the indictment rests, nor could they well do so without confounding business distinctions enumerated and separately taxed therein. The word, in our opinion, is neither used in the act nor in its common acceptation in a sense which admits its application to the conduct of the defendant, as ascertained in the special verdict. The writer of this opinion has examined the clauses imposing a tax upon the business of a drummer, contained in the series of enactments for raising revenue from 1866 to 1885, to discover its meaning from its relations and surroundings, and it is manifestly employed to mark out as a proper subject for taxation, another and distinct employment from that of general and stationary merchandising, such as that in which the defendant is engaged.

[Omitted.]

It is very obvious that this legislation is directed to a class of travelling or itinerant tradesmen, first to such as represented non-resident merchants, and whose occupation was in competition with resident merchants, who paid an assessment upon their business to which the non-resident was not subject. It was subsequently extended to similar agencies, engaged in the same calling, of resident merchants, perhaps to avoid a discrimination that might fall under the inhibitions of the Federal Constitution. *Albertson v. Wallace*, 81 N. C. 479.

But the essential and distinguishing difference between these, and salesmen having a fixed place of business, is that the drummer is a travelling and soliciting salesman, and these separate callings are assessed with dissimilar taxes in the entire series of financial legislation. That this is the sense of the legislation is manifest from an inspection of the enactment itself. The expression "with or without samples" indicates the absence of the goods proposed to be sold from the place of sale, and can scarcely be supposed to include the home merchant, whose stock of goods is on hand for direct examination.

Our definition of the term is not without the support of judicial authority.

"The term 'drummer,'" says TURNER, J., delivering the opinion of the court, "has acquired a common acceptation, and is applied to commercial agents who are travelling for wholesale merchants, and supplying the retail trade with goods, or rather taking orders

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for goods to be shipped to the retail merchant, upon which merchandise the State collects her revenue." *Singleton v. Fritsch*, 4 Lea, 93.

We are therefore clearly of opinion that the act of the defendant is not within the penal interdict of the statute, nor does it make the defendant a drummer, subject to its provisions.

[Minor point omitted.]

There is no error in the ruling, and the judgment must be affirmed.

No error.

Judgment affirmed.

STATE V. CASE.

(98 N. C. 545.)

Criminal law — evidence — attempt to bribe.

On the trial of a criminal action it is competent to show that the defendant attempted to bribe one of the jury, although that is a distinct offense

CONVICTION of adultery. The head-note shows the point.

Attorney-General, for State.

ASHE, J. [Omitting other points.] There is no error in the judgment of the Superior Court. The evidence objected to by the defendant was properly admitted. In criminal cases, every circumstance that is calculated to throw light upon the supposed crime is admissible. *State v. Swink*, 2 Dev. & Bat. 9. The fact, that immediately after the discovery of a crime, the person charged with its commission flies, is admitted as a circumstance to be considered by the jury. *State v. Nat*, 6 Jones, 114. So it is held that if the prisoner, when arrested, attempts to make his escape, or attempts to bribe the officer to let him escape, the evidence is admissible. 11 Ga. 123; *Fanning v. State*, 14 Mo. 386; *Dean v. Commonwealth*, 4 Gratt. 541; 26 Iowa, 215.

But the defendant contends that the offer to bribe the juror is a distinct offense, and it is therefore inadmissible in evidence. There are some authorities sustaining that position. But Roscoe, in his work on Criminal Evidence, says: "The notion that it is in

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itself an objection to the admission of evidence that it discloses other offenses, especially where they are the subject of indictment, is now exploded." If the evidence is admissible on general grounds it cannot be resisted on this ground, and he cites numerous authorities to support the position.

There is no error, and the judgment of the Superior Court is affirmed. Let this be certified.

No error.

Judgment affirmed.

STATE V. TERRY.

(98 N. C. 585.)

Criminal law — concealed weapons — "his own premises."

A mere servant, hired by the prosecutor to assist him in the cultivation of his land, being on such land is not "on his own premises," within the statute against carrying concealed weapons.

CONVICTION of carrying concealed weapons. The opinion shows the case.

The *Attorney-General*, for State.

ASHE, J. The case falls clearly within the inhibition of the statute. The statute forbids any person from carrying concealed weapons, except when on his own premises. The word "premises" here is evidently used as synonymous with land, for the statute proceeds to declare, if any one not being on his own lands shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof, that is, one may carry a weapon concealed about his person, while on his own land, but when he goes off his own upon that of another, and is seen with, or is known to have a deadly weapon, as is described in the statute, the bare possession of the weapon is *prima facie* evidence of the concealment. What is meant by his own premises and his own land is not that he must have a legal title to the land, for we think, one who is in the occupation of land as a tenant at will, or at sufferance, would in the meaning of the statute be the owner thereof. So would an agent or an overseer, or any one who is vested with the right of dominion or superintendence over it.

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But we cannot see how one who is a mere servant can in any sense of the term be said to be the owner of the land, or to be on his own premises, when he is simply employed as a laborer. He has no interest in the land and no dominion over it.

The defendant, then not being on his own land, is at work as a hireling on the land of the prosecutor, and when remonstrated with for some negligence in his work, flies into a passion, draws a pistol from the inside pocket of his coat, which he had placed upon a stump, and with it, threatened his employer. It is to be presumed that he carried the pistol with him into the field, and probably with the very purpose of using it, in the event of a difficulty with his employer. It is to be presumed that he wore his coat to the field. If any one carried it there for him, or if the pistol was so carried in the coat pocket as to be open to view, and not concealed, it was easy to be proved by his own testimony; but he offered no testimony to rebut the *prima facie* case made out against him by the facts of the case, and he was properly convicted. There is no error. Let this be certified.

No error.

Judgment affirmed.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

BIRKE V. ABBOTT.

(108 Ind. 1.)

*Judgments— assumption — conveyance of land — mortgage — sheriff's sale —
merger — subrogation — equity — contract — negligence.*

The owner of land on which there were judgment liens sold it to B., who assumed the payment of such judgments as a part of the purchase-price. Without paying such liens, B. quit-claimed the land to C., who did not assume them. C. mortgaged the land to X., and after the mortgage was recorded he conveyed it by warranty deed to W., who had no actual knowledge of the X. mortgage, and who assumed the payment of the judgments. Subsequently W. discovered the mortgage, and instead of paying the judgments he allowed the land to be sold on them and obtained sheriff's deeds. *Held*, that by the assumption W. became the principal debtor and primarily liable to pay the judgments.

ACTION to quit title. The opinion states the case. The defendant had judgment below.

F. Rand and J. M. Winters, for appellant.

F. J. Van Vorhis and W. W. Spencer, for appellee.

MITCHELL, C. J. This was an action brought by the appellants to quit their title to a certain fifty-five acre tract of land in Marion county.

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There were answers and a cross complaint filed by Abbott, and upon issues joined on the complaint and cross complaint the cause was submitted to the court for trial. A special finding of facts was made, upon which the court stated its conclusions of law adversely to the appellants.

All the facts necessary to develop the questions for decision are the following: In 1870, one Church owned the land in controversy, and while owning it, two judgments were recovered against him in favor of the estate of Colley, one being a foreclosure against the land for something over \$1,000, the other a personal judgment for about \$600. Church sold and conveyed the land to Ferree, July 20, 1870, the purchaser assuming in his deed the existing incumbrances above mentioned, as part of the purchase-price. On January 7, 1873, Ferree sold and conveyed to Julius A. Kelly, who made a like assumption of the liens. Julius A. Kelly, on March 21, 1873, having paid nothing on the incumbrances, quit-claimed the land to Lewis L. Kelly, in whose deed no assumption of the incumbrances appears, and who did not assume them in fact. On the same day on which the land was conveyed to Lewis L. Kelly, he executed a warranty mortgage on it to David B. Abbott, to secure a note of \$1,000 of even date therewith, payable in three months, with ten per cent interest. This mortgage was duly placed of record on the 24th day of June, 1873. On the 30th day of July, 1873, Kelly sold and conveyed the land to Witt by deed containing covenants of warranty, the purchaser assuming in his deed, as part of the purchase-price, the payment of the above-mentioned incumbrances to the Colley estate. Of the Abbott mortgage, Witt had at the time he purchased and took his deed, no actual knowledge. At the time of the conveyance to Witt, the land had been sold on one of the Colley judgments, and a certificate of purchase was held by the purchaser. The amount for which it sold was expressly stipulated in the deed, and this sum with costs, together with the judgment on which no sale had been made, Witt stipulated to pay as part of the purchase-price. After the conveyance and assumption above mentioned, Witt discovered the Abbott mortgage, and instead of paying off the Colley incumbrances, he purchased and took an assignment of the certificate of sale on the one and permitted the land to go to sale on the other. Subsequently he obtained sheriff's deeds on both. It was found that he took this course in order to protect his title. Kelly was and still is insolvent. The

land was found to be worth about \$2,500. The Colley claims, with interest, amount to about the full value of the land, and the Abbott mortgage and interest amount to \$2,218. The appellants have by certain *mesne* conveyances succeeded to the rights of Witt, and are in possession.

The questions for consideration are: Witt having assumed the payment of the Colley judgments, could he acquire title as against Abbott by the subsequent sales made on those judgments, and if he could not, will the judgments be kept alive for the purpose of protecting the title which he acquired from Kelly?

The appellants' counsel press the argument with much force: 1. That the sheriff's deeds to Witt, which were made in pursuance of the sales on the judgments mentioned, are effectual to cut out the Abbott mortgage, notwithstanding the assumption contained in Witt's deed. 2. That if this is not so, then Witt and those in privity with him are subrogated to the rights of the Colley estate, and the liens are on foot for their protection against the Abbott mortgage.

The propositions above stated involve substantially the same principles. If under the circumstances, Witt, upon making payment, was not and could not be subrogated to the rights of the holder of the incumbrances, which he assumed to pay, then whether he paid them in pursuance of sheriff's sales or otherwise, they were extinguished, and no right can be predicated upon them, either as respects the title obtained under them or liens antedating the Abbott mortgage.

If after obtaining the title from Kelly upon the agreement, and consideration that he would pay off the Colley judgments, Witt could, upon discovering the Abbott mortgage, instead of paying the prior incumbrances, according to his agreement, purchase the certificate of sale on the one, and permit the land to go to sale on the other, and by that means acquire a title antedating the subsequent mortgage, it must be because he stood in such relation to the judgments and mortgage as that the doctrine of equitable subrogation would obtain for his benefit.

Ordinarily, any person may acquire title to land through the medium of a sheriff's sale, but there may be cases in which the purchaser from his relation to the land sold, or to the judgment upon which the sale is made, is precluded from acquiring title under such judgment or sale.

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Where the complete legal title is already in the purchaser, another title obtained through a judicial sale would merge in the prior title, if it appears that the title formerly held and that acquired by the sale are held in the same right, with no intervening title in a third person. If however the title so obtained was procured for the purpose of cutting off intervening titles or incumbrances, and to re-enforce a title then held, the subsequently acquired title will merge or be kept on foot, depending on the relation in which the purchaser stood to the judgment or sale on which the title is predicated.

If the purchaser was primarily liable to pay the incumbrance on account of which the sale was made, it would seem reasonably manifest that he could build up no additional title on his own default.

Where a legal title to the whole estate is claimed by one in possession, all subsequently acquired titles, co-extensive with or derived from the same source of that held, are presumptively merged. Equity will keep such subsequently acquired title alive as against intervening incumbrances, only in case the purchaser owed no personal duty, or was under no binding obligation which required him to prevent such title from accruing.

Where however the purchaser of real estate as a part of the consideration for the purchase by express contract stipulates that he will pay incumbrances on the land, he thereby comes under a personal obligation to pay such incumbrances. Thenceforth, as to all persons who were liable before him, he is the principal debtor, and they stand in the relation of sureties to him, and he could not thereafter defeat incumbrances which intervened between his title and other liens, which upon a sufficient consideration he had become personally bound to pay. *Winans v. Wilkie*, 41 Mich. 264; *Heim v. Vogel*, 69 Mo. 529; Pomeroy Eq. Jur., § 797.

That the assumption of the Colley judgments contained in the deed from Kelly to Witt made the latter personally and primarily liable, is the established rule of decision in this State, and this contract enured to the benefit of the creditor as well as those previously liable for the debt. *Snyder v. Robinson*, 35 Ind. 311; s. c., 9 Am. Rep. 738; *Hill v. Minor*, 79 Ind. 48; *Josselyn v. Edwards*, 57 Ind. 212; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Hoffman v. Risk*, 58 Ind. 113; *Davis v. Hardy*, 76 Ind. 272; *Ritter v. Cost*, 99 Ind. 80, and cases cited. And this is the rule generally prevailing. Sheldon Subr., § 85; Pomeroy Eq. Jur., § 1207.

Some discussion may be found upon the question whether the mere fact that one has or claims title to and is in possession of land should preclude him from making a purchase at a tax or other sale in extinguishment of the title or claim of another with whom he stands in no contract or fiduciary relation; but whatever may be said on that subject, it seems clear upon authority and well founded in equity that where a purchaser of land upon which there are incumbrances, of all of which he has constructive notice, deliberately by contract assumes such relation to some of them as that he becomes with reference to them the principal debtor, he cannot by the violation of his contract, predicate a title on the incumbrances, which upon a sufficient consideration he contracted to discharge.

It is argued that because Kelly, the grantor of Witt, was not personally liable for the incumbrances which his grantee assumed, the assumption of the latter did not bind him personally, and that in consequence the rule above stated does not apply. In support of this proposition counsel rely upon *Trotter v. Hughes*, 12 N. Y. 74; *King v. Whitely*, 10 Paige, 465; *Pardee v. Trent*, 82 N. Y. 385, and *Vrooman v. Turner*, 69 N. Y. 280; s. c., 25 Am. Rep. 195. The holding in some of the cases cited is in substance, that where the grantor in a deed is not personally liable for a debt, the payment of which the grantee assumes in the deed, such assumption amounts to nothing more than taking the title subject to the incumbrance, and is a personal contract between the grantor and grantee and does not inure to the benefit of the creditor whose debt is assumed.

It is said that as the grantor had no concern with, and was not liable for the debts assumed, and had no interest in making provision for their payment, the court would not intend that it was the purpose of the parties to the contract that it should inure to the benefit of the creditors, and therefore the grantee did not become personally liable to them. This was the theory of *King v. Whitely*, *supra*, and *Trotter v. Hughes*, *supra*. In the later case of *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, the doctrine of these cases was considered and repudiated. In the still later case of *Vrooman v. Turner*, *supra*, some recognition was given the earlier cases; but in the case of *Pardee v. Treat*, *supra*, upon a consideration of all the previous cases, the rule was stated in substance that if the purchaser's contract of assumption was of such special character,

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that the grantor remained primarily and the grantee secondarily liable, then it did not inure to the benefit of the creditor.

The doctrine of *King v. Whitely* and *Trotter v. Hughes, supra*, has not been generally accepted, even in New York; the prevailing doctrine elsewhere, as stated in section 1207, Pom. Eq. Jur., where these cases are referred to, is that the liability of a grantee who assumes prior incumbrances depends upon his contract, and not upon the liability of his grantor. The application of the rule contended for could make no difference in this case. Kelly, having executed a warranty mortgage to Abbott, had a direct interest in providing for the payment of the prior incumbrances. Although not personally liable, the land was chargeable in his hands with their payment. *Spray v. Rodman*, 43 Ind. 225; *Atherton v. Toney*, 43 Ind. 211.

It may be assumed that it was Kelly's purpose, in leaving in Witt's hands a sufficient sum out of the purchase-price to discharge the prior incumbrances, to secure their extinguishment for the benefit of his covenants in the Abbott mortgage. Abbott, by virtue of his warranty mortgage, had such an interest in and benefit from the contract of assumption by Witt, as the money thereby reserved in his hands for the purpose of removing the prior incumbrances could not have been appropriated in any other direction while the contract of assumption remained in force. *Baring v. Moore*, 4 Paige, 166.

For the reasons already stated, by the payment of the incumbrances assumed, Witt was not in a situation to be subrogated to the rights of the Colley estate. Having assumed the payment of these incumbrances, he had no equity to have them kept on foot. 1 Jones Mort., § 743.

Subrogation takes place only where one has performed the obligation of another, or has paid his own debt, the burden of which has for a valuable consideration been assumed by another, or when he has paid incumbrances for the protection of his own title or interests, the payment of which he has not assumed by contract. The debtor upon whom rests the ultimate obligation of discharging the debt cannot by his payment acquire any right of subrogation. A purchaser cannot be subrogated to the benefit of an incumbrance which he has agreed to pay. Sheldon Subro., § 46.

Upon the subject a learned author has said: "If payment of the mortgage debt is made to the mortgagee or other holder of the

mortgage, by a party who is himself personally and primarily liable for the debt, who is in any manner and by any means the actual primary debtor, whose duty it is to pay the debt absolutely and before all others, such payment operates *ipso facto* as an end of the mortgage, and the lien is completely destroyed. The party so paying is not subrogated to the rights of the mortgagee; there is no equitable assignment to him of the mortgage security; even if he should receive a formal assignment, the mortgage could not be thus kept alive, but would be wholly merged and ended." Pomeroy Eq. Jur., § 1213.

The same author, in a note to section 1206, lays down the rule in the following language: "Since such grantee thus becomes the principal debtor, primarily and absolutely liable for the debt, when he pays the mortgage it is completely extinguished. * * * He cannot by any form of assignment, legal or equitable, or by subrogation, keep the mortgage alive as against other liens on the land." See also Pomeroy Eq. Jur., § 797.

The same rule was applied in *Carlton v. Jackson*, 121 Mass. 592. It was there held that when an incumbrance is paid by one whose duty it was, by contract or otherwise, to pay it, such payment effected a release or discharge of the debt, and it could not thereafter be kept alive for any purpose. To the same effect are *Willson v. Burton*, 52 Vt. 394; *Heim v. Vogel*, 69 Mo. 529, and *Jones Mort.*, § 743.

By the contract of assumption the judgments in favor of the Colley estate became binding on Witt precisely as if they had been originally taken against him, and as was said by Howk, J., in *Ritter v. Cost*, 99 Ind. 80, when he paid them off, he merely paid his own personal debt, for which, under his contract, he became personally liable. And as was said by ELLIOTT, J., in *Klippel v. Shields*, 90 Ind. 81, "Payment by one primarily liable as a judgment debtor extinguishes the judgment." Or as was tersely said by THOMPSON, C. J., in *Abbott v. Kasson*, 72 Penn. St. 183: "It would be a novelty for a purchaser of land to keep on foot his own mortgage against his own estate."

It is said that the conclusion above stated will operate harshly against Witt and his grantees; that because he made the assumption contained in his deed without actual notice of the Abbott mortgage, the application of the principles announced will result in injury to him, while to keep the judgments alive will leave Abbott in no worse position than he was before; that Witt had no actual

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notice of the Abbott mortgage could only have resulted from his neglect to attend to what the record disclosed. Against negligence a court of equity can afford no relief. Besides the record shows that before he paid his money on the Colley judgments he had discovered the Abbott mortgage, when instead of taking steps to rescind the contract, he undertook to re-enforce his title by acquiring titles under the judgment which he contracted to pay. If he was entitled to any equitable relief at all, that relief could have been afforded when he discovered the mortgage in ignorance of which he avers the contract of assumption was made, but having executed the contract by paying the judgments, or doing that which was in legal effect the same as paying them, with knowledge of the mortgage, a court of equity cannot now relieve him from an injudicious contract negligently made and fully executed with knowledge of the facts. Besides Abbott was in no fault. He put his mortgage of record for the information of all who should thereafter deal with the land, and in law the record was effectual for that purpose ; that he is placed in a more advantageous situation by reason of the contract of assumption between Kelly and Witt is not to be denied. But his mortgage being of record, we must assume that the parties to the contract of assumption made it with knowledge of the fact and of the benefit which would accrue to him, and we have no power now arbitrarily to say he shall not have it. The cases of *Peet v. Beers*, 4 Ind. 46, and *Ayers v. Adams*, 82 Ind. 109, are relied on as sustaining the view that a mortgage may be kept on foot by a purchaser who has assumed its payment. The decision in *Peet v. Beers, supra*, is apparently put on the ground that the purchaser, notwithstanding his assumption, stood in the situation of a surety to the mortgage assumed. Upon no other basis could the conclusion have been reached, that subrogation took place upon payment. Whatever may have been the rule at and before *Peet v. Beers, supra*, was decided, this court, as nearly all others, is now so thoroughly committed to the doctrine that the purchaser who assumes an incumbrance is the principal debtor, and the vendor or other person who was primarily liable is the surety, that it cannot now recede from it. Of *Ayers v. Adams, supra*, it may be said, that the question does not seem to have been either presented or considered. It seems to have been conceded on all hands, that if what was received by the creditor constituted payment of the debt assumed, the purchaser was entitled to be subrogated.

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The question is now distinctly presented, and we must accept the alternative of deciding whether or not a purchaser, who by his assumption makes a debt his own, can after paying it off keep it on foot, or whether he will be treated as having paid and discharged his own debt. We feel constrained to adopt the latter view.

We think the cases of *Peet v. Beers, supra*, and *Ayres v. Adams, supra*, are to be distinguished from the one before us, and that neither is, for the reasons above suggested, authority against the conclusion reached.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

ELLIOTT, J. I concur in the conclusion that Birke could not acquire title under the sheriff's sale on the Colley judgments, but dissent from the conclusion that he could not hold and enforce them as liens against the Abbott mortgage.

Judgment affirmed.

STATE V. STEVENS.

(108 Ind. 55.)

Constitutional law — twice in jeopardy — criminal punishment and civil fine.

A statute providing in substance that any officer guilty of extortion shall, in addition to being deemed guilty of a misdemeanor, be liable on his bond for five times the illegal fees charged, is not unconstitutional as putting the party twice in jeopardy.

ACTION to recover for illegal fees exacted. The opinion states the case. The defendant had judgment below.

J. S. Scobey, for appellant.

J. D. Miller and *F. E. Gavin*, for appellees.

MITCHELL, C. J. The relator brought this suit on the official bond of Stevens, who was formerly clerk of the Decatur Circuit Court. The action was based on section 6031, R. S. 1881. This section enacts that "Any officer who shall charge, demand or take any fee for any official act done or performed under the provisions

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of this act, other than as is herein allowed and provided for, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, and shall be liable on his official bond to the party injured for five times the illegal fees charged, demanded or taken, and the same may be recovered, with costs, in the Circuit Court."

It is charged that the defendant Stevens, having been elected and qualified as clerk, took upon himself the duties of that office on the 1st day of November, 1875, and continued therein until the expiration of his term; that on the 6th day of February, 1877, a civil suit was commenced against the releasor in the Decatur Circuit Court, which continued pending until the 31st day of July, 1879, when it was dismissed at his costs; that upon the dismissal of the suit, Stevens made up and taxed the costs for his services as clerk on the fee books of the court, and that of the costs so taxed there was included, in various specified items, the sum of \$20 in excess of his legal charges which, on the 29th day of May, 1882, he demanded of the relator, and for which he issued a fee bill, on the 5th day of June, 1882. The relator prays judgment for \$100, being five times the amount of the fees alleged to have been illegally charged and demanded.

The court below sustained a general demurrer to the complaint, and the case comes here on this ruling.

It is argued by the learned counsel for the appellee that so much of the statute as authorizes the recovery of five times the illegal fees charged, in a suit by the injured party on the official bond of the officer, is unconstitutional, as being within the prohibition of that part of the Bill of Rights which declares that "no person shall be put in jeopardy twice for the same offense." The extent of the argument on this point is the statement of the proposition by counsel for the appellee, and the citation in its support of *Koerner v. Oberly*, 56 Ind. 284; s. c., 26 Am. Rep. 34. In the appellant's brief we find no allusion to the question. This leads us to conclude that the ruling below must have turned upon some other point. As the question is presented for decision, it would have been a source of satisfaction to the court if the learned counsel on both sides had favored us with such argument of it as their learning and ability led us to expect. Whatever may be said of the case above cited, we do not think it controls the decision of the one before us. That was a suit brought by a wife to recover damages for an un-

lawful sale of intoxicating liquor to her husband, who was in the habit of becoming intoxicated. Section 12 of the act of 1873, Acts 1873, p. 151, gave a right of action against any person so offending in favor of any person who should be injured thereby in person, property or means of support. It authorized a recovery by any person so injured of all damages which might be sustained, "and for exemplary damages." The same act made it a misdemeanor for any person to sell intoxicating liquor to a person in the habit of becoming intoxicated, and provided a penalty to be enforced by indictment or otherwise. It was held in the case relied on, that in so far as section 12 attempted to authorize the recovery of exemplary damages by the injured person, it was in conflict with the provision in the Bill of Rights above quoted, and therefore inoperative and void.

It has been the settled rule of decision in this State since the case of *Taber v. Hutson*, 5 Ind. 322; s. c., 61 Am. Dec. 96, that in all that class of torts, for which, in addition to the civil remedy allowed to the injured party, the wrong-doer was amenable to criminal punishment, exemplary or punitive damages could not be recovered in a civil action; while in the class not rising to the degree of criminality, the injured party might, where the elements of fraud, malice, gross negligence or oppression mingled in the controversy, in addition to full compensation for all other damages, recover what is termed exemplary or punitive damages. *Lytton v. Baird*, 95 Ind. 349; *Stewart v. Maddox*, 63 Ind. 51, and cases cited.

As defined, compensatory damages are held to include not only such pecuniary loss or injury in a given case as is capable of approximately accurate calculation, but in addition thereto such a sum as may be supposed adequate to compensate "for injury to business or profession, reputation or social position, and for physical suffering, as bodily pain, permanent disfiguration," etc., "and for mental trouble, as anguish of mind, sense of shame or humiliation, loss of honor," etc., "all of which are considered compensatory, and not exemplary or punitive damages."

Exemplary or punitive damages, the terms exemplary and punitive being synonymous, are damages allowed as a punishment, or by way of example, to deter others from the like offenses, for torts committed with accompanying fraud, malice or oppression.

The rule of decision defining the class of cases in which exemplary damages would, and that in which such damages would not be

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allowed, rests wholly on judicial construction, and except in the case of *Koerner v. Oberly, supra*, and *Shafer v. Smith*, 63 Ind. 226, which involved the same statute, and followed the first named case, none of the cases in which the rule is declared and applied involve any question of legislative power.

Previous to the decision in the *Koerner* case, the court seemed to regard the constitutional provision referred to as an obstacle against its power to allow, or at least against the policy of allowing exemplary damages in the class of cases where the defendant was also subject to criminal punishment. While the question of power was not in any case, so far as we know, directly determined, the prevailing rule was adopted by the court as being in consonance with the spirit of both the constitutional provision and the ancient common-law maxim, and as a safe middle ground in a controversy with which courts and lawyers are familiar.

In *Koerner v. Oberly, supra*, it was distinctly ruled that the legislature was prohibited by the Constitution from authorizing the infliction of exemplary damages for a wrong which was also punishable as a crime.

Whatever may be thought of the rule, so far as it rests on judicial construction, in the opinion of the writer, it is not the part of it which denies the infliction of punitive damages in some cases that is open to criticism, so much as that which permits it in any civil case. The assumption that the Penal Code should be supplemented by *quasi* judicial legislation, so as to allow damages to the injured party by way of punishment of the wrong-doer, in cases where none is inflicted by legislative enactment, is, as it would seem, much less defensible than the denial either to the courts or legislature of the right to add unlimited damages as a punishment in civil cases where a prescribed punishment is already attached to the offense.

Whether the provision that "no person shall be put in jeopardy twice for the same offense" has technical application to the infliction of punishment by way of exemplary damages in civil cases, so as to prohibit it, has been the subject of much learned discussion.

In *Taber v. Hutson, supra*, after suggesting that to allow exemplary damages might expose the defendant to double punishment, in violation of the spirit of the Bill of Rights, it was said that "though that provision may not relate to the remedies secured by civil proceedings, still it seems to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that

each violation of the law should be certainly followed by one appropriate punishment and no more."

In the case of *Brown v. Swineford*, 44 Wis. 282; s. c., 28 Am. Rep. 582; RYAN, C. J., impliedly admitting that the rule which allowed exemplary damages in such cases was against the spirit of the maxim that no one should be twice vexed for the same offense, said: "The word jeopardy is therefore used in the Constitution in its defined, technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information or otherwise." Expressing marked disapprobation of the rule, the learned court nevertheless held that a constitutional provision, similar to that under consideration, did not stand in the way of allowing exemplary damages in civil suits, even when the act complained of was punishable as a crime. So in the case of *Elliott v. Van Buren*, 33 Mich. 49; s. c., 20 Am. Rep. 668, speaking upon this subject CAMPBELL, J., said: "The argument that a person is thereby punished twice within the constitutional and common-law rules is, in our opinion, entirely fallacious. The maxim at common law, that no one shall be twice vexed for the same cause, where it applied at all, prevented a second prosecution as well as a second punishment, and if it applied to civil damages would cover the whole, and not merely what is assumed to be a part of them. But there is no analogy between the civil and criminal remedies. The punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress."

With great respect for the learned judges from whose opinions we have quoted, we are nevertheless not persuaded to adopt either the reasoning so cogently set forth or the conclusions reached. Whatever may be said in respect of the technical application of the constitutional provision which prohibits double punishment for the same offense to civil remedies, it is difficult to see how the practical result is in any degree mitigated, if in fact after all other proper elements of damages are considered and allowed in a civil case for a tort for which the defendant is liable to be punished criminally, the jury may assess an unlimited sum as punishment by way of exemplary damages.

It is no answer to the constitutional guaranty against double punishment to say that the penalty, limited and prescribed by the Penal Code, is to redress the grievance of the public, while the other,

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unlimited and undefined punishment, awarded by way of exemplary or punitive damages, is for private redress. To the extent that damages are awarded in any case for private redress, they cannot be exemplary. The private injury is fully redressed when all its elements are considered and compensated for. Exemplary damages only commence at the point where full private or compensatory damages end, and so long as there remains any private injury to be redressed, no exemplary damages are or can be awarded. The result of it is that to the extent that exemplary damages are allowed in any case which is punishable criminally, the defendant is or is liable to be twice punished for the same offense, once by the State for the public grievance, and again by the injured party for example's sake, for the supposed benefit of the public, to deter others from the like offending. *Austin v. Wilson*, 4 Cush. 273; s. c., 50 Am. Dec. 766. The fact that the damages allowed under the name of punitive or exemplary go to the benefit of the injured party, renders the punishment no less real, and as is said by the learned author, "After there has been one trial in which the moral culpability of the defendant has been tried with a view to the punishment in the interest of the public, any other trial for the same purpose, whatever may be the form of the proceeding, is in substance and effect putting the accused again in jeopardy of punishment for the same offense and vexing him again for the same cause." 1 Suth. Dam., 740, 741.

In *Fay v. Parker*, 53 N. H. 342; s. c., 16 Am. Rep. 270, this question was fully considered in an opinion conspicuous for its research and learning. The conclusion was there reached that the fundamental maxims of the common law, as well as the provision in the Bill of Rights, were an effectual barrier against the infliction of punitive damages in a civil case where the defendant was subject to be criminally punished for the same offense. FOSTER, J., delivering the judgment of the court, said: "These maxims apply both to criminal and civil proceedings. * * * If then this constitutional prohibition of a double penalty is indeed nothing more than an affirmation of the general principle of the common law, applicable alike to civil and criminal cases, making a judgment in one action a bar to another action, founded on the same cause, it follows logically that punitive damages are a violation of the general principle of the common law as well as of the Constitution." In further illustration the learned judge said: "Just as firmly is the right secured to him,

that in all cases wherein he is charged with conduct such as calls for punishment for the sake of public vengeance or public example (and to him it can make no difference, so long as the blow must fall, whether it comes from the arm of the civil or the criminal law), that he shall be permitted to confront his accusers and their witnesses face to face, and not be tried upon depositions, and that he shall go free unless his guilt is proven beyond a reasonable doubt."

Thus much by way of a re-examination of *Koerner v. Oberly*, *supra*, seemed proper with a view of determining the ground upon which the decision in the case before us should rest, and upon the assumption that the statute there in question authorized the infliction of unlimited, unrestricted exemplary damages as a punishment for an offense which was also made punishable as a crime, we adhere to the ruling in that case with renewed confidence.

It cannot be said that where the legislature has prescribed one definite penalty as the punishment for an offense, it may, in addition, authorize the injured party, under the guise of exemplary damages, to subject the offender to another uncertain, indefinite punishment which is to be measured only by the varying and unrestrained discretion, or it may be passion of the jury. If the provision that "no one shall be put in jeopardy twice for the same offense" is, as this court has recognized it to be, a sure protection against the power of the courts in that regard, it must be deemed equally potential against the power of the legislature. It cannot be maintained in reason that it shall be interpreted to mean that the courts cannot adjudge a second punishment for the same offense, except when expressly authorized by the legislature, for the reason that in so far as the legislature attempts to authorize such second punishment, the barrier of the Constitution is as effectual against it as it is against the court.

While the foregoing considerations lead us to adhere to the ruling in *Koerner v. Oberly*, *supra*, they at the same time direct us to the conclusion that the act here in question is not obnoxious to the objection claimed. The distinction between the case relied on and that under consideration is that in the first the legislature, after affixing to the offense a prescribed punishment, undertook to authorize the recovery of exemplary damages, which, as we have seen, implies nothing less than a second punishment for the same offense by way of unrestricted damages for the sake of public example. In the statute here involved, the legislature has done

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nothing more than to fix or measure by a definite sum the amount which the injured party shall be entitled to recover on the official bond of the public officer. While the act of taking or making the unlawful charge or demand is made a misdemeanor, punishable by a fine to the State, the legislature, not by way of additional or double punishment, but for the purpose of defining the liability of the officer to the injured party, has provided that he shall be liable on his official bond in five times the amount of the fees illegally charged, demanded or taken. In such a case it can be truly said that "the punishment by criminal prosecution is to redress the grievance of the public while the civil remedy is for private redress."

The legislative assumption is that the injury done by the public officer, who makes the illegal charge, will not be adequately compensated by leaving the parties to their common-law rights and liabilities, and accordingly it has provided what in its judgment would be adequate compensation to the one, and fixed the just liability of the other. There is in this no element of exemplary or punitive damages.

It cannot be said that part of the recovery is allowed by way of example, or for the punishment of the offender, when it is apparent that the legislative purpose is nothing more than to fix the amount of the civil liability of the officer as a measure of compensation for the injury. Who shall say that a person, from or against whom an inconsiderable sum is illegally demanded or charged by an officer who is armed by law with compulsory process to enforce his demand, such person being obliged to incur the expense of a suit to redress his grievance, is more than compensated by a recovery of five times the amount so charged, demanded or taken? This is the measure of recovery fixed in all cases, and no circumstances of fraud, malice or oppression can make it greater.

While it may be conceded that the statute which thus fixes the amount is in a sense penal, the penalty prescribed is nevertheless fixed by way of compensation for the injury sustained, and to fix the liability of the officer on his bond, executed to the State, for the injurious act. The whole penalty prescribed for the offense, taking the statute altogether, is the fine prescribed to the State, and the liability on the official bond fixed by way of recompense to the injured party, and even regarding the whole statute as penal, it cannot be said that the person offending has been put in jeopardy of the

penalties prescribed until he has been tried for the misdemeanor, and has also answered for the penalty fixed to the injured party as his compensation.

Statutes which fix or limit the amount of recovery which may be had, by way of compensation on the bond of a public officer, or by way of redress for an injury sustained by the tortious act of another, are one thing, while those which provide for unrestricted exemplary damages, by way of public example, after the injured party has been allowed full compensation, are quite another. As was said in *Blatchley v. Moser*, 15 Wend. 215: "The one may be said to be a private remedy, the other, a public one for the same offense."

All criminal punishment is of necessity punitive and in a degree exemplary, and when an offender is made the subject of example by being once punished criminally, and is again subjected to exemplary damages in a civil suit for the same offense for a public example, he is put to the hazard of being set up as an example twice for the same offense. Where however a statute makes certain conduct a misdemeanor, and annexes to it a prescribed fine to the State, and also provides that the wrong-doer shall be liable to the injured party in a fixed or limited sum, it is certain from the beginning what the consequence of the offense may be, and there is no possibility that the penalties may overlap each other so as to put him in jeopardy of being tried twice, or suffering double the punishment prescribed for the same offense. Of the power of the legislature to fix the amount of liability on an official bond, recoverable as compensation by the person injured, there can be no question, and this power is not affected by the consideration that the act out of which the liability grows is also punishable criminally; nor can it be doubted that it has the power to prescribe fines and penalties against certain acts, and at the same time fix or limit the civil liability for the same acts.

[Minor questions omitted.]

Judgment reversed, with costs.

ELLIOTT, J., concurred in the conclusion, but believed that the legislature "has the authority either to limit the amount to be recovered, or to leave it to be ascertained upon a trial."

Judgment reversed.

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HAMILTON V. STATE.

(108 Ind. 98.)

Criminal law — indictment — signing.

An indictment is sufficiently "signed" by the prosecuting attorney, when his name with his official title is printed at the bottom with his sanction. (*See note, p. 498.*)

CONVICTION of selling intoxicating liquor without license. The opinion states the point.

F. T. Hord, attorney-general, and *W. B. Hord*, for State.

NIBLACK, J. The indictment in this case, with all the usual and necessary formality, charged the appellant, Hamilton, with having on the 10th day of January, 1885, sold to one Beard intoxicating liquor, in a less quantity than a quart at a time, to-wit, one gill of such liquor, at and for the price and sum of ten cents, without a license to so sell intoxicating liquor. The indictment was a printed blank with the term of court, date, name of appellant, and charging part filled in with a pen, and the name of the prosecuting attorney, with the title of his office annexed, printed at the bottom instead of being written, as is usual in attaching the name of that officer to an indictment.

The appellant moved to quash the indictment upon the ground that the signature of the prosecuting attorney was necessary to its validity, and the attaching of his name in print was not his signature within the meaning of the statute requiring that an indictment shall be signed by him. But the Circuit Court overruled the motion to quash, and a jury returned a verdict of guilty, fixing the appellant's punishment at a fine only, upon which a judgment of conviction was rendered.

Error is first assigned upon the refusal of the Circuit Court to quash the indictment.

Section 1669, R. S. 1881, provides that after an indictment has been found by a grand jury, "it must be signed by the prosecuting attorney," and where an indictment is returned without his signature, section 1670 makes it the duty of the court to require the prosecuting attorney to sign it. Section 240 of the same re-

vision of statutes, which prescribes certain rules for the construction of the statutes of this State, declares that "The words 'written' and 'in writing' shall include printing, lithographing, or other mode of representing words and letters. But in all cases where the written signature of any person is required, the proper handwriting of such person or his mark shall be intended."

The word "sign," as a verb, has several shades of meaning, and hence a statutory requirement that an instrument in writing or a pleading shall be "signed" by some person or officer to make it complete, is much more general and comprehensive than a similar requirement that such an instrument or pleading must be "subscribed" by the person or officer. 3 Pars. Cont., bottom p. 8. On the same principle, the "signing" of a written instrument or pleading by a person or officer has a much broader and more extended meaning than attaching his "written signature" to it implies. When a person attaches his name or causes it to be attached to a writing, by any of the known modes of impressing his name upon paper, with the intention of signing it, he is regarded as having "signed" the writing. On that subject Waterman on the Specific Performance of Contracts, at section 240, says: "Where the buyer's name was stated in the commencement, and signed with his initials, it was held sufficient. The signature may be in pencil. And if the party's name be printed or stamped on the memorandum, he intending it at the time as his signature, and affirming it to be such, it will constitute a signing within the requirement of the statute. Thus where a vendor inserted in a printed invoice, which contained his name, the name of the purchaser, it was held that there was such a ratification and adoption of the printed name as satisfied the statute." See Rapalje & L. Law Dictionary, Title "Sign — Signature;" Fry Spec. Perf. Cont., § 500; Chitty Cont., p. 549; also authorities cited by these authors.

As the prosecuting attorney is required to sign an indictment as a matter of verification merely, there is no reason for enforcing a more rigid rule as to the validity of his signature than in cases of ordinary business transactions, to which the authorities above cited mainly have reference. This is plainly inferable from the fact that a prosecuting attorney may appoint a deputy, who by virtue of his appointment, becomes authorized to sign the name of such prosecuting attorney to indictments as well as to other pleadings filed on behalf of the State in a criminal cause. R. S. 1881, §§ 5568,

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5569, 5570; *Stout v. State*, 93 Ind. 150. If therefore the name of the prosecuting attorney be legibly attached to an indictment by his consent, whether express or implied, it is a sufficient "signing" by him within the meaning of the statute, and when the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority.

[Other points omitted.]

The judgment is affirmed with costs.

Judgment affirmed.

NOTE BY THE REPORTER.—As to the sufficiency of a signing under the statute of frauds, see *Drury v. Young*, 58 Md. 546; s. c., 42 Am. Rep. 843.

Under a statute requiring a summons to be "subscribed" by the attorney, it is sufficient if his name is printed at the bottom. *Meechen v. More*, 54 Wis. 214. The court said: "The summons is not a writ or process of the court, but is simply a notice to the defendant that an action has been commenced against him, and that he is required to answer to the complaint which is either attached thereto or is or will be filed in the proper clerk's office. As the statute now to be construed does not require in terms that the summons shall be signed in the proper handwriting of the attorney issuing the same, and as the purposes of the statute are as fully accomplished by attaching thereto the printed signature, there is no substantial reason why such printed signature should not be construed to be a subscription within the meaning of the law. We can see no evil results which would be likely to follow from allowing a summons to be issued with the printed signature of the attorney or party, which would not result from allowing it to be signed in writing by an authorized clerk or agent of the attorney or party. There does not seem to be any middle ground. It must either be held that the statute requires the written signature of the attorney or party, and comes within the defining statute which in such case requires the signature in his proper handwriting in every case where such attorney or party is able to write; or we must hold that the statute which requires simply subscription does not require the written signature of such attorney or party, and may therefore be complied with by a written or printed signature at the option of the party issuing it. The latter construction appears to be better sustained by the authorities than the first. We have no doubt that such is the proper construction."

This was founded on the New York practice authorized in *Barnard v. Heydrick*, 49 Barb. 62; s. c., 2 Abb. Pr. (N. S.) 47.

In the latter case the court say: "There are many cases where printing is substituted for writing in instruments which under our statutes are required to be in writing. It is the general practice for deeds, or conveyance of real estate, and bills of sale of personal property to be printed; and it is very common to use printed agreements for the sale of both real and personal estate, and their validity is conceded, yet the statute declares that 'they shall be in writing.' The name of the attorney issuing the summons is as effectually dis-

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closed when it is printed, as if it were written; and his responsibility to the defendant and to the court, in either case, is the same."

The same is held as to promissory notes and the like. *Schneider v. Morris*, 2 Maule & S. 286; *Brown v. Butchers' Bank*, 6 Hill, 443. In the latter case an indorsement was made in written figures, but the court said any mark which the party chose to adopt for his name would suffice. 1 Dan. Neg. Inst., § 74.

In *Schneider v. Morris*, LE BLANC, J., said: "Suppose the defendant had stamped the bill of parcels with his own name; would not that have been sufficient? Such a stamping, as it seems to me, if required to be done by the party himself, or by his authority, would afford the same protection as signing."

In *Chapman v. Inhab. of Limerick*, 56 Me. 390, held that the return upon a warrant for a town meeting must bear the sign manual of the officer who executed it, and may not be signed by another for him, and in his name and presence. The court said: "It may be admitted that a private person, when acting in his own business, may bind himself by a signature which he directs another to make for him; but the law generally means by a signature the writing by a man of his own name, or by actually making his mark."

In *Stevens v. Kwoer*, 2 Metc. 74, it was held "immaterial whether a blank writ be signed by the clerk, or his signature be annexed thereto by his order."

A marksman may be a subscribing witness to a will. *Meehan v. Rourke*, 2 Bradf. 385; *Morris v. Kniffin*, 37 Barb. 336; *Harrison v. Harrison*, 8 Ves. 185.

A marksman may subscribe a will as a testator. *Baker v. Dening*, 8 Ad. & Ell. 94; *Chaffee v. Braft*. Miss. Cour., 10 Pal. 85; *Guthrie v. Price*, 23 Ark. 396.

A marksman may subscribe a bill of sale. *Zacharie v. Franklin*, 12 Pet. 151.

But under a statute requiring an olographic will to be "entirely written by the hand of the testator," it will not answer to fill up a printed blank form. *Rand's Estate*, 61 Cal. 468.

And if a portion of the date is printed it will render the will invalid. *Matter of Billings*, 64 Cal. 427.

Where an attesting witness to a will cannot write, his name may be written for him by another, at his request, in his presence and in presence of the testator. *Lord v. Lord*, 58 N. H. 7; s. c., 42 Am. Rep. 565.

In *Stone v. Marvell*, 45 N. H. 481, the case of an affidavit, it was said: "The word *subscribed*, when used in reference to the authentication of a writing or document, ordinarily implies that the name of the party who subscribes is set by him or by his authority at the bottom or end of the writing or document." To the same effect, *James v. Patten*, 6 N. Y. 9, the case of a memorandum under the statute of frauds; *Wild Cat Branch B'k v. Ball*, 45 Ind. 213, the case of a bond.

"Writing" has been several times construed to be satisfied by equivalents. Thus, printed ballots will answer for "written votes;" *Henshaw v. Foster*, 9 Pick. 312. Stenographic notes are a "taking in writing;" *Nichols v. Harris*, 32 La. Ann. 646. A judicial order by telegraph is an "order in writing;" *State v. Holmes*, 56 Iowa, 588. The court there said: "It has been said it makes no difference if the writing was done with a steel pen an inch long, attached

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to an ordinary penholder, or whether the pen be a copper wire one thousand miles long. *Hopley v. Whipple*, 48 N. H. 487; *Trevor v. Wood*, 86 N. Y. 807. The telegraphic operator was the agent of the judge, and by means of the wire and instruments attached thereto and the operator, the judge wrote the telegram which was delivered to the clerk."

WOLKE v. FLEMING.

(108 Ind. 105.)

Statute of frauds — lease — debt of another — performance — consideration.

Where on the assignment of a lease, the assignee orally agreed to assume the covenants, and pay the rent, this was not a promise to answer for the default of another, within the statute of frauds.

Where one has rendered services, or transferred property, under a contract voidable under the statute of frauds, he may recover the value of the services or property.

ACTION for rent. The opinion states the case. The defendant had judgment below.

T. E. Ellison, for appellant.

W. H. Coombs, *R. C. Bell* and *S. L. Morris*, for appellee.

ELLIOTT, J. On the 25th day of November, 1868, Louis Wolke executed to Robert Lowry a written lease, demising to him real estate in the city of Fort Wayne for the term of ten years. The lease was recorded on the 22d day of February, 1869. Lowry entered into possession and remained in possession until September 17, 1870, and on that day executed a written assignment to Tucker, Dunn and Henderson. The assignees undertook to perform all of the covenants and conditions of the lease. Subsequently, Tucker assigned his interest in the leasehold to Frank Furste, who assumed the obligations of Tucker. In 1873 Furste sold and transferred to William Fleming his interest in the business conducted on the demised premises, and put Fleming into possession. The latter agreed, as the complaint alleges, "as part of the consideration of such sale and transfer, to assume the covenants, and pay the rent agreed in said lease." The lease contains a covenant binding the lessees to pay \$1,200 per annum rent for the demised premises.

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The rent has not been paid since November 25, 1874, and the premises have been injured by the wrongful act of the tenants in possession. It is not averred that the assignments to Furste or to Fleming were in writing, nor is it averred that the lessees have been in possession of the premises since November 25, 1874. Fleming, by the purchase of the interest of Furste, became a member of the firm originally composed of Tucker, Dunn and Henderson, but subsequently changed by the withdrawal of Tucker and the admission of Furste. The appellant succeeded by inheritance to the ownership of the real estate demised.

The assignments to Furste and to Henderson are not alleged to be in writing, and they are therefore deemed to have been by parol. *Budd v. Kraus*, 79 Ind. 137.

The appellee's argument prevailed below, and is renewed here. It rests upon these propositions:

First. Fleming's contract is a promise to answer for the default of another, and is within the statute of frauds.

Second. The contract of Fleming is within the statute of frauds, because it is one that cannot be performed within one year.

Third. An assignment of a lease conveys an interest in real property, and must be in writing.

Of these propositions in their order. The first proposition is assumed with much confidence and the question treated as if it were free from difficulty. We do not share counsel's confidence, for we perceive serious difficulty in the question. Fleming's contract is for the benefit of a third person, and his promise is part of the consideration of the sale and transfer of the leasehold interest to him. It is a promise to a third person, and not to the creditor. There is an express promise to pay the rent, for this is the effect of his assumption of the obligations of his assignor. We have then a contract wherein the assignee of a leasehold agrees, as part of the consideration of the sale and transfer of that interest to him, to pay rent to the owner of the fee. It is difficult, if not impossible, to perceive any difference between such a contract and that of a grantee in a deed who assumes to pay an existing incumbrance on the land. Here the party for whose benefit the promise is made stands in relatively the same position as a mortgagee; the consideration of the promise for his benefit is the sale of the leasehold interest to the promisor, and the debt which the latter assumes is part of the purchase-money. It has been many times decided that the

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assumption by a grantee of the debt of his grantor is not within the statute of frauds. * *Josselyn v. Edwards*, 57 Ind. 212; *Campbell v. Patterson*, 58 Ind. 66; *Hoffman v. Risk*, 58 Ind. 113; *Carter v. Zenblin*, 68 Ind. 436; *Davis v. Hardy*, 76 Ind. 272, and authorities cited 274; *Rodenberger v. Bramblett*, 78 Ind. 213; *Dunham v. Craig*, 79 Ind. 117, see p. 122; *Pounds v. Chatham*, 96 Ind. 342.

In *McDill v. Gunn*, 43 Ind. 315, the reasons upon which this doctrine rests are stated, and among the cases cited and approved is that of *Barker v. Bucklin*, 2 Denio, 45. In that case the defendant bought a pair of horses of his brother, agreeing as part of the purchase-price to pay a debt of his brother to the plaintiff, and it was held that the contract was not within the statute, the court saying: "Such promise was no more within the statute of frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother of whom he purchased them."

The case of *Helms v. Kearns*, 40 Ind. 124, declares the same doctrine as the cases cited, the court in the course of the opinion, saying: "The contract was with the debtor to pay his debt to his creditor. Such a contract, it is well established, is not within the statute of frauds."

In the case of *Fisher v. Wilmoth*, 68 Ind. 449, the point decided appears in this statement of the court: "As to the appellants, the substantial allegations in both paragraphs are, that they for a valid consideration to them paid, agreed with Manke & Fisher to make certain payments to the plaintiff which they had failed and refused to make. Such promises are not within the statute of frauds, and are hence binding upon parties making them." The court in another case, said: "Here the appellant promises the appellee, not that she will pay a debt of a third person to the appellee, but that she will give him certain property and money if he will do a certain act, viz., extinguish the debt due to him from a third person. He executes the contract on his part. It was a valid contract, good between the parties, on good considerations, mutually, and as it was not on the part of appellant a promise to pay the debt of another, it was valid as to her, though not in writing." *Palmer v. Blain*, 55 Ind. 11. In direct line with these cases, and fully maintaining their doctrine, are the cases of *Louisville, etc., Ry. Co. v. Caldwell*, 98 Ind. 245; *Indiana Manufg. Co. v. Porter*, 75 Ind. 428; *Headrick v. Wischart*, 57 Ind. 129; *Crim v. Fitch*, 53 Ind. 214.

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A recent writer says: "The rule adopted in this class of cases is that an agreement to pay and discharge the debt of another made with the debtor or some person on his behalf, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or spirit of the statute." Wood Frauds, 197, § 125. In support of the text decisions are cited from nearly all of the courts of the Union. Other treatises upon the statute of frauds lay down the rule substantially in the same terms as those employed by the writer from whom we have quoted. Browne Stat. Frauds (4th ed.), § 166*b*; Reed Stat. Frauds, § 115.

The case before us falls fully within the principle declared by these authorities, for Fleming promised a third person, upon a new and valuable consideration, to pay Furste's obligation to his creditor. *Anderson v. Spence*, 72 Ind. 315; s. o., 37 Am. Rep. 162; Wood Frauds, 290. If Fleming had undertaken to pay the rent to Furste, no one would claim that the case was within the statute, and the fact that instead of promising to pay it to Furste directly, he agreed to pay it to Wolke, the creditor, cannot affect the question. So far as the claim for rent is concerned, we deem the complaint good as against the objection under direct discussion. Whether it is good in so far as it seeks a recovery for injury to the demised premises, is a question not considered or decided.

The second proposition stated presents a different question from that discussed. To parry the force of the appellee's argument upon this proposition appellant's counsel relies upon the doctrine of part performance, but he leans on a broken reed, for the doctrine of part performance has no application to contracts that cannot be performed by either party within a year. Wood Frauds, 492; Reed Stat. Frauds, § 208; 1 Add. Cont. (3d Am. ed.) 317, § 212.

Fleming's contract cannot, it is evident, be performed within one year, for the rent which he agreed to pay is not due within that period. The intention of the parties, as indicated by their contract, is that the promisor, Fleming, shall not perform his part of the contract within a year. It is the intention that governs. Wood Frauds, 463, and authorities cited there. If however the contract were conceded to be within the statute, still there could be a recovery for the value of the consideration actually received, for it is quite well settled that one who has rendered services or transferred property under a contract, voidable under the statute, may recover the value of the services or property, under the *quantum*

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meruit or the *quantum valebat*. Reed Stat. Frauds, § 211; Wood Frauds, 434, 435; Browne Stat. Frauds (4th ed.), § 124; *Arnold v. Stephenson*, 79 Ind. 126, *vide* p. 129; *Stephenson v. Arnold*, 89 Ind. 426; *Landers v. Beck*, 92 Ind. 49, *vide* p. 51.

There are cases holding that the provision of the statute making void contracts that cannot be performed within one year has no application to contracts conveying an interest in lands. *Fall v. Hazelrigg*, 45 Ind. 576; s. c., 15 Am. Rep. 278; *Baynes v. Chastain*, 68 Ind. 376. If this be the law, and the appellee is right in asserting that the contract declared on is one conveying an interest in land, his argument upon this point utterly fails. But leaving out of view this doctrine and proceeding upon grounds where authority is more abundant, we shall find that the law is against him.

The case is not within the statute, for possession has been taken under the contract, and on one side there has been full performance. The author from whom we have already quoted says: "In England, and most of the States of this country, it is held that the statute only applies to contracts which are not to be performed by either side within a year, and therefore where a contract has been completely performed on one side within the year, the case will not be within the statute." Wood Frauds, 494 : 1 Add. Cont. 319, § 312. This is the doctrine of this court. *Houghton v. Houghton*, 14 Ind. 505; *Haugh v. Blythe*, 20 Ind. 24. The rule is a just one, because the party who has fully received all he contracted for should be coerced into doing what he promised. The doctrine is in harmony with the equitable principle that the statute of frauds cannot be made the instrument of fraud, and to permit Fleming to acquire and retain all he contracted for and escape liability by interposing the statute as a shield, would be unjust.

[Minor matters omitted.]

Judgment reversed, with instructions to overrule the demurrer to the complaint.

ZOLLARS, J., did not sit.

Judgment reversed.

Rosenfeld v. Peoria, Decatur and Evansville Railway Company.

ROSENFELD v. PEORIA, DECATUR AND EVANSVILLE RAILWAY
COMPANY.

(108 Ind. 131.)

Carrier — limiting liability.

Where it is stipulated in a bill of lading that in case of loss or damage the value or cost at the place of shipment shall govern, the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations, interpreted by the carrier to mean "Leaks and outs excepted, \$20 railroad valuation," will not bind the shipper, and he may recover the actual value of the goods at the place of shipment.

ACTION to recover value of goods not delivered. The opinion states the case. The defendant had judgment below.

C. L. Wedding, for appellant.

C. Denby, and *D. B. Kumler*, for appellee.

ZOLLARS, J. Appellant delivered to appellee a barrel of whisky to be transported and delivered to James O'Brien at Litchfield, Illinois. It was never delivered, and appellant brought this action to recover its value. When it was delivered to appellee, appellant received from its agents a bill of lading. In that there is a statement of the name and residence of the consignee, and a description of the article as "1 barrel whisky, of 400 pounds weight." Following these statements there is a blank, followed by printed stipulations, one of which reads thus: "In the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same." In the blank there are letters and figures which witnesses say are "L. & O. Ex. \$20 R. R. val.," but they are so run together, and illegible, that it would be impossible for any one, not knowing for what they were intended, to decipher them all. The interpretation of these characters, as given by the agents of the railway company is, "Leaks and outs excepted, \$20 railroad valuation."

The contention in behalf of the railway company is, that because of those characters in the bill of lading, appellant is limited in his recovery to \$20 and the interest on that amount from the time the whisky should have been delivered. The court below adopted this

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theory, rendered judgment for the appellant for \$21.40, although the barrel of whisky was shown to have been worth \$96.

On the other hand, appellant contends that the printed stipulations as to the amount of recovery should control, and that if the characters in the blank space, with the interpretation given them by witness, should be regarded as a part of the contract, it would be such a contract as the courts should not uphold. Thus we have the questions presented by the argument of counsel:

First. Can a railway company make and enforce a contract limiting the amount of recovery against it for the loss of articles received by it for transportation, as a common carrier?

Second. Do the characters in the blank in any way have the force and effect of a contract binding upon appellant?

These in their order: It is the settled law of this State, abundantly supported by authority and reason, that while common carriers may, by contract, limit their liability as insurers, they cannot, by contract, relieve themselves from the consequences of their own negligence or fraud. The law will not allow a common carrier to contract to be safely negligent or dishonest. *Michigan Southern, etc., R. Co. v. Heaton*, 37 Ind. 448; s. c., 10 Am. Rep. 89; *Ohio, etc., Ry. Co. v. Selby*, 47 Ind. 471; s. c., 17 Am. Rep. 719; *St. Louis, etc., Ry. Co. v. Smuck*, 49 Ind. 302; *Adams Express Co. v. Fendrick*, 38 Ind. 150; *Indianapolis, etc., R. Co. v. Allen*, 31 Ind. 394. See Lawson Cont. of Carr. 31 *et seq.*, and the numerous cases there cited.

In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, after holding that common carriers cannot contract against their liability for negligence, the court reached the following conclusions: "First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

Under these rules, and the elaborate reasoning upon which they are based, may common carriers arbitrarily, or by contract, place a value upon articles received for carriage, and in this way limit the amount of recovery against them in case of loss? If they may contract against all liability for loss by means other than their own negligence or fraud, of course they may contract for the amount of

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recovery in such cases. But in case of a loss through their negligence or fraud, the same reasons, at first view, would seem to exist against contracts limiting the amount of recovery as exist against contracts for total exemption; and hence some of the courts have held such contracts invalid. *Kansas City, etc., R. Co. v. Simpson*, 30 Kans. 645; s. c., 46 Am. Rep. 104; *United States Ex. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Trans. Co.*, 55 Wis. 319; s. c., 42 Am. Rep. 713; *Moulton v. St. Paul, etc., Ry. Co.*, 31 Minn. 85; s. c., 47 Am. Rep. 781.

If without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case he would clearly have the right to recover the full value of the articles lost by the carrier.

If on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus get reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which by deceit he caused the carrier to fix. To hold otherwise would be to enable the shipper to take advantage of his own wrong.

Carriers have the right to fix their charges according to the value of the article to be carried. The greater the value the greater the responsibility and liability in case of loss. For assuming these the carrier is entitled to charge increased compensation. *Lawson Cont. of Carr.* 88, 89 and cases there cited.

If the shipper may, by false statements or artifice, deceive the carrier as to value, and thus get lower rates, and still recover from the carrier the full value, he is enabled to consummate a wrong upon the carrier which should not be sustained by the courts. *Graves v. Lake Shore, etc., R. Co.*, 137 Mass. 33; s. c., 50 Am. Rep. 282; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.

To hold the carrier liable in such a case for the full value of the article beyond the representation of the shipper, would seem to be neither just nor reasonable, and if neither just nor reasonable such a holding is not demanded by any considerations of public policy. This limited liability is not regarded as in conflict with the general rule, that common carriers cannot by contract limit their liability

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for loss occurring through their negligence, but as an exception to it. 2 Greenl. Ev., § 215; Lawson Cont. of Carr. 87, and cases there cited; Story Bail., §§ 565, 567; *Cole v. Goodwin*, 19 Wend. 251.

Another rule of law that seems to be settled by the weight of authority, is that if the carrier claims that by contract or the misconduct of the shipper his common-law liability has been limited, the burden is upon him to clearly show it, and all such contracts will be interpreted most strictly against the carrier.

In the case of *St. Louis, etc., Ry. Co. v. Smuck, supra*, this court said: "But in our opinion, contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them as such, should be construed most strongly against them." *Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360; Lawson Cont. of Carr., §§ 135, 246, and cases there cited. And so too that carriers may, by fixing value, limit this common-law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value as we have before stated.

Tested by these rules of the law, how stands the case before us? As we have seen, there is an express and definite stipulation in the bill of lading, that in case of loss, the value or cost at the point of shipment shall measure the amount of the recovery. To overthrow this specific stipulation, appellee relies upon the figures and letters in the blank, which as we have seen are so written that no one could read or interpret them, unless he had previous knowledge of their import. Schoul. Bailm. 468. We think that it would not be reasonable to hold that these shall overthrow the express and plainly printed stipulation above referred to, and that the only proper and reasonable construction of the contract is, that it fixes the amount of recovery in case of loss at the value of the barrel of whisky at the point of shipment.

The evidence shows that the agents of appellee put the letters and figures upon the bill of lading without the knowledge or consent of appellant. He had no understanding or knowledge of their import, except what they of themselves import and that was practically nothing. He made no representations as to the value of the barrel of whisky, nor was he asked to make any.

The testimony by the agents of appellee tends to show that less freight was charged than would have been charged had the value

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been stated at a greater amount; but there is no evidence that appellant was a party to such an arrangement, nor that he had any knowledge of it. There is evidence that he had accepted several like bills of lading for barrels of whisky shipped, but they of themselves would not furnish any information that the carrier, by such letters and figures, was limiting its liability, first, because the figures and letters could not be intelligently deciphered by the shipper, and second, if they could, they would not be sufficient to overthrow and destroy the plainly printed stipulation that the damages should be measured by the value at the point of shipment. We do not regard this as a case to be settled upon a conflict of the evidence, but as a case where there is no evidence at all to bind the shipper to the value so fixed by the carrier. For these reasons we think that the judgment should be reversed. Other questions are discussed by counsel, but it does not seem necessary that we shall now decide them.

The judgment is reversed with costs, with instructions to the court below to sustain the appellant's motion for a new trial, and proceed in accordance with this opinion.

Judgment reversed.

CULLEN V. TOWN OF CARTHAGE.

(108 Ind. 198.)

Municipal corporation — power to employ counsel.

Trustees of a town have implied power to employ counsel to defend the marshal against an action of false imprisonment brought by one arrested by him for violation of a town ordinance. (See note, p. 508.)

ACTION for counsel fees. The opinion states the case. The defendant had judgment below.

W. A. Cullen, B. L. Smith, and W. J. Henley, for appellants.

C. Cambern, T. J. Newkirk, J. Q. Thomas and J. J. Spann, for appellee.

ZOLLARS, J. A demurrer was sustained below to appellants' complaint. That ruling is assigned as error. Counsel have dis-

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cussed the question of the sufficiency of the complaint upon the assumption and concession that it makes this case, viz.: Oliver Wiltse was the marshal of the town of Carthage. One Drury Holt, in violation of the town ordinances, was drunk and disorderly, and made a serious and deadly assault upon Dr. Bogart, a peaceable and quiet citizen of the town. For this infraction of the ordinances, the marshal arrested him and placed him in the town prison. Holt afterward brought a suit against the marshal for false imprisonment. The board of trustees of the town employed appellants as attorneys to defend the marshal in that action. This they did successfully, following the case through this court. *Wiltse v. Holt*, 95 Ind. 469.

The town now refuses to pay them for their services, upon the ground that the employment and contract by the board of trustees was *ultra vires* and void, and hence not binding upon the town. It is not necessary to decide as to whether or not a town marshal in this State is so far the agent or servant of the town that it will be liable for his negligence or torts. That question is not involved here.

If the employment by the board of trustees was *ultra vires*, and hence void, the town is not, and cannot be estopped to make that defense at any time. In such a case, the fact that the services were rendered under the employment can avail the appellant nothing. If the corporation was a private corporation, or if it were a case simply of an irregular exercise of power, the case would be different. *Driftwood, etc., Turnp. Co. v. Board, etc.*, 72 Ind. 226.

The important question here is, was the contract of employment beyond the powers granted in the organic law of the corporation? One section of that act is as follows: "All moneys, however derived belonging to such corporation, shall only be appropriated for such objects and defraying such expenses as accrue, or necessarily arise, in the exercise of powers granted by this act." R. S. 1881, § 3339.

It is settled that corporations, including municipal corporations, have the powers expressly granted, and such incidental power as may be necessary to carry out those expressly granted. The above section of the statute does not, we think, abridge this general rule, and does not inhibit the appropriation of money to any purpose or object reasonably connected with or necessary to powers granted.

The board of trustees have power to preserve peace and good order, and to prevent vice and immorality. To this end they have power to make and establish the necessary by-laws, ordinances and regulations, and fix fines, penalties and forfeitures for a violation

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thereof. R. S. 1881, § 3333, clauses 6 and 16, and § 3346. The marshal is to execute the orders of the trustees and enforce the by-laws and ordinances. R. S. 1881, § 3327.

Under the above sections, power is given to the trustees to accomplish one important object of the corporation, by preserving peace and good order, and preventing vice and immorality. In whatever will promote these very important ends the corporation is interested. Such an interest has been declared to be the test of authority. Dill. Mun. Corp., § 147, and cases there cited. It is upon this test that it has often been held that municipal corporations have power to indemnify their officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority. And upon the same test, and grounded upon the same reasons, it has been held also that the corporation may appropriate money to defend suits brought against its officers for acts done in good faith in the discharge of their official duties.

In the case of *Sherman v. Carr*, 8 R. I. 431, it was held that the city council might appropriate money to defend the mayor in an action for false imprisonment, based upon the ground that he had exceeded his authority. There was a limitation in the city charter very similar to the statute above set out, that the council should not have power to appropriate money, except for the regular, ordinary and usual expenses of the city.

This case, involving as it does, a statute so similar to that involved in the case in hearing, is authority to support appellants' claim and the interpretation we put upon our statute. See, also, to the same effect, *Briggs v. Whipple*, 6 Vt. 95; *Baker v. Inhabitants of Windham*, 13 Me. 74; *Pike v. Middleton*, 12 N. H. 278; *State v. Council of the town of Hammonton*, 9 Vroom, 430; s. c., 20 Am. Rep. 404.

In the case of *Fuller v. Inhabitants of Groton*, 11 Gray, 340, it was held that the town had power to appropriate money to defend a school committee against an action for libel, alleged to be contained in one of their reports to the town. Among other things it was said: "That towns have power to raise money to idemnify their officers against liabilities incurred or damages sustained in the *bona fide* discharge of their duties is now well settled." In support of this statement, the court cite *Nelson v. Milford*, 7 Pick. 18; *Bancroft v. Lynnfield*, 18 Pick. 566; s. c., 29 Am. Dec. 623; *Hadsell v. Hancock*, 3 Gray, 526.

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In passing upon the main question in the case before us, we have adopted the construction of the complaint placed upon it by counsel, and dispose of it upon the assumption that in arresting and imprisoning Holt, the marshal was engaged in an effort to enforce an ordinance of the town, and to thus preserve peace and order. That the ordinances should be thus enforced, and that peace and order should be preserved, are matters in which the town is interested. Under the cases already cited, it would seem to be clear that the board of trustees might have indemnified the marshal against liability in his efforts to thus enforce the ordinances and preserve peace and order.

One of the essential things in the enforcement of laws and the conservation of the peace and quiet of a community is, that the people shall have that respect for the constituted authorities that arises out of a common understanding that the laws will be rigidly executed.

In every community there is a greater or less number of people who yield obedience to the law, and respect the rights of others, simply because they fear the consequences of an opposite course. It is necessary that such shall be made to understand that the laws will be executed, and that the executive officers will be sustained in their efforts to execute them. If it should be understood that the marshal of the town is left without support of the governing body, to defend himself against all manner of suits that might be instituted against him, the vicious and violent might, by a succession of annoying suits against him, greatly cripple the enforcement of the ordinances. Such an understanding would, at least, have a tendency to embolden the vicious and intimidate the marshal. Upon these considerations and others that might be urged, and upon an examination of the whole case, we think that the town had such an interest in the result of the suit against the marshal as authorized the board of trustees to employ appellants to make the defense. The board of trustees having such authority, and the services having been rendered in good faith under the employment, it is too late now for the town to refuse to pay for the services. Whether or not such employments shall be made in any particular case, of course, will rest in the sound discretion of the board of trustees.

In dealing with the complaint we have, as before stated, adopted the construction placed upon it by counsel. Upon that construction

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it is sufficient, and makes a case in favor of appellants against the town, and the court below erred in sustaining the demurrer. The judgment is reversed at the costs of appellee.

We suggest that before trial, the complaint ought to be made more certain and specific.

Judgment reversed.

NOTE BY THE REPORTER.—In *Sherman v. Carr*, 8 R. L. 431, it was said: “The question therefore presented is, whether it is in the power of the city council to indemnify one of the officers of said city, who performing the duties of his office in good faith, has exceeded the powers of that office and thereby incurred damages at law. The terms of the city charter forbid the council, after the enumeration of certain prohibitions having no direct resemblance to the matter in hand, to ‘do or transact any matter except such as belong to the legitimate duties of a municipal body within its own province,’ ‘or to vote money for any object except for the regular, ordinary and usual expenses of the city.’ Is it then a legitimate duty? Is it then one of the usual and ordinary expenses of a city to protect its officers who, while exercising in good faith the functions of their office, have been found by the verdict of a jury to have exceeded the lawful powers of that office, and to have trespassed on the rights of a citizen? If the power to indemnify an officer under these circumstances does not rest in that body who appropriate the money for all the legitimate duties of a municipality within its own province, the various executive officers of a city perform their duties at the peril of an individual responsibility for all their mistakes of law and of fact, however honest and intelligent they may be, and also at the peril of the possible mistakes of a jury naturally jealous of the rights of the citizen, when brought in conflict with the exercise of official power. If the officer is thus responsible, he will naturally be too cautious, if not timid, in the exercise of his powers — powers which must be frequently exercised for the protection of society before and not after a thorough investigation of the case in which he is called upon to act. On the other hand, it may be urged, if the officer has the right to fall back upon the treasury of the city, there is danger that he will become reckless and overbearing in the exercise of the powers of his office. It would seem therefore to be the wisest to leave the indemnification of the officer to the discretion of those who represent the interests of the city, that on the one hand, they should not be without the power to indemnify a meritorious officer, acting in good faith, for the consequences of his conduct, and on the other hand, they should not be obliged to protect every officer, though acting in good faith, under circumstances which seem to them to indicate a blamable want of care and caution. Under such a state of the law, every executive officer of the corporation would feel that he was acting as the servant and agent of that corporation, relying upon their good faith and good judgment toward him, so long as he acted in good faith and good judgment in the discharge of his duties.

“This distribution of power, which would be practically the wisest in the administration of municipal affairs, is the one which we understand to be in

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accordance with the existing law and long continued practice in this State. It is one which many decisions in a neighboring State, whose system of statute law and judicial decisions is most like our own, show to have been frequently upheld in the courts of that State. We are not furnished with any authorities which tend to establish a contrary doctrine. We know of no case in which, while the officer continues to act in behalf of the community, and not in his own behalf, it is held that the community cannot indemnify him. We therefore find that the appropriation of money in this case by the city council of Newport was within their authorized powers. And it is not for us to inquire as to the wisdom or discretion with which those powers were exercised. We must therefore deny the injunction."

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(108 Ind. 208.)

Landlord and tenant — removal of fixtures — new lease.

The right of a tenant to remove trade fixtures does not extend to the term of a new lease not providing for the removal.

ACTION to restrain the removal of fixtures. The opinion states the case. The plaintiff had judgment below.

B. F. Davis and *S. A. Forkner*, for appellant.

T. S. Rollins, for appellee.

MITCHELL, C. J. Elizabeth D. Smith, as owner of certain premises in the city of Indianapolis, brought this suit against Hedderich, who was in possession, to restrain him from removing therefrom a "club-house" which had been erected thereon, and other alleged fixtures, which it was claimed were a part of the freehold.

The case was put at issue and tried by the court, the result being a finding and judgment for the plaintiff below.

[Omitting minor points.]

The plaintiff took title to the premises from her deceased husband, Ebenezer Smith. The place was known as "Volk's Garden," and had upon it one building which was used as a saloon, and another called the "club-house." The club-house was built by one Baldus while occupying as tenant of Smith. In April, 1879, Hedderich, with the knowledge and consent of Smith, purchased the

club-house and fixtures of Baldus, paying therefor \$700 in cash. Contemporaneously with the purchase from Baldus, he took a lease of the premises from Smith for a term of three years. Whether by the terms of this lease the right to remove the property in dispute was reserved, does not appear. During the continuance of this lease Smith died, and his widow succeeded to his title.

At the expiration of the term Hedderich leased the premises from Mrs. Smith for a term of one year, at a stipulated rent, payable monthly. The rent reserved for the new term was different from the old. The lease contained the usual covenants for repair by the tenant, and for the surrender of the premises at the expiration of the term without waste. There is in it no reservation of a right to remove any building or fixtures annexed to, or situate upon the land. Some repairs and alterations were made to the club-room by the tenant during his term, and he asserted the right to remove it and the fixtures which he had purchased from Baldus. Whether the building was so annexed to the freehold as to become part of it, or whether it could be removed without injury to the reversion, were propositions asserted on one hand and denied on the other, but as the finding of the court was for the plaintiff, it must be assumed here that it was so annexed.

That a tenant, who for the better enjoyment of the leasehold erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings if the removal can be accomplished without permanent injury to the freehold, is well settled. It is equally well settled that if he neglects to remove them during his rightful continuance in possession, unless his right to do so afterward is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases. *Cromie v. Hoover*, 40 Ind. 49; *Allen v. Kennedy*, 40 Ind. 142; *Hamilton v. Huntley*, 78 Ind. 521; s. c., 41 Am. Rep. 593; *Griffin v. Ransdell*, 71 Ind. 440.

Assuming that the tenant had the right to remove the building and fixtures during the continuance of his first term, the question still remains, what was the effect of his taking a new lease upon different terms from Mrs. Smith, without reserving any right of removal?

Without question, if there had been nothing more than an extension of the old lease upon the same terms, the respective rights of the parties would have remained the same. The acceptance of a new lease

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upon different terms was, however the creation of a new tenancy. It would seem that when the new lease was made, it was a lease of the whole estate as it then existed, including the club-house now in dispute, with whatever else was a part of the freehold. This estate the lessee covenanted to maintain in repair, and at the expiration of his term surrender up. It results from the terms of the lease, that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture, erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this would, in effect, be to permit him to deny the title of his landlord to part of the demised premises; and if he may deny his title to a part, why not to the whole? The acceptance of the new lease was an effectual surrender of the old, together with the estate and all other rights which the old lease secured to him. Thenceforth he was in as of a new estate, which is to be measured by the condition of things existing when it commenced, and by the covenants, conditions and reservations contained in the new lease, from which the rights of the parties must be determined and regulated.

Upon this subject the elementary writers are agreed. Accordingly, the rule is stated by an approved author thus: "But while a tenant may remove a trade fixture at any time during his original term, or any renewal thereof, yet although he continues in possession after the expiration of his original term, if he holds under a new lease, in which no provision for the removal of the fixtures is made, he is treated as having abandoned his right thereto." Wood Landl. and Ten., § 532. So also in Taylor Landl. and Ten., § 552, the author says: "If a tenant, at the close of his term, renews his lease, or surrenders it, for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to remove such fixtures, as he had a right to sever under the old tenancy. For where his continuance in possession is under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation, as if the landlord, being seised of the land together with the fixtures, had demised both to him."

The principles above stated are sustained by the adjudications of the courts in the following, among other, well-considered cases: *Loughran v. Ross*, 45 N. Y. 792; s. c., 6 Am. Rep. 173; *Watriss*

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v. *First National Bank, etc.*, 124 Mass. 571; s. c., 26 Am. Rep. 694; *Jungerman v. Bovee*, 19 Cal. 354.

It results that the judgment of the Marion Superior Court was right, and it is accordingly affirmed, with costs.

Judgment affirmed.

SUMMERS V. BOARD OF COMMISSIONERS OF DAVIESS COUNTY.

(108 Ind. 292.)

Municipal corporation — negligence — of physician for poor.

A municipal corporation is not liable for the negligence of a physician for the poor, unless the corporation is shown to have been negligent in his selection.

ACTION for malpractice. The opinion states the case. The defendant had judgment below.

J. H. O'Neill and D. J. Heffron, for appellant.

J. W. Ogdon and M. F. Burke, for appellee.

ELLIOTT, J. The appellee alleges in her complaint that she fell and broke her leg; that she was poor and unable to procure a surgeon to attend her, and that James F. Parks was employed by the county to give medical and surgical attention to those who were too poor to employ physicians and surgeons. It is also averred "that James F. Parks, at the time he was so employed, was not a skillful physician, having a knowledge of surgery, but on the contrary was unskillful in the profession, and had no knowledge of surgery, and was incompetent to intelligently perform the duties of a physician and surgeon." It is further alleged that Parks was called upon to attend the appellant, and that his want of knowledge and lack of skill were such that he so unskillfully and improperly treated her as to do her great injury.

If in any case a recovery could be had against the county for the unskillful and improper manner in which a surgeon treated an injured poor person, it is clear there can be none in this, for it does not appear that the board of commissioners did not exercise care and diligence in the selection of a physician for the poor.

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Where care and diligence are used in the selection of a physician the officers representing the county have done their duty, and where there is no breach of duty there can be no negligence. Mere errors in judgment do not constitute negligence.

We put our decision on broader grounds. The commissioners are public officers, charged with the performance of public duties, and in the performance of public duties they are not mere agents. It is true that officers occupying positions similar to those held by county commissioners are often spoken of as agents, and in some cases it is perhaps proper to treat them as agents. But even when such officers are regarded as agents, a broad and important difference is noted between public and private agents, and essentially different rules govern the two classes. *Newman v. Sylvester*, 42 Ind. 106; *Art v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 89 Ind. 497; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Platter v. Board, etc.*, 103 Ind. 360.

Where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim *respondent superior* does not govern. This rule is illustrated in many cases. In the case of *Ogg v. City of Lansing*, 35 Iowa, 495; s. c., 11 Am. Rep. 499, it was held that a city was not liable for the negligence of persons placed in charge of a small-pox hospital which the city had established. It was said in the course of the opinion in that case, that "it is impossible to conceive of the endless complications and embarrassments which such a doctrine would involve, and of the extent to which the public interests would thereby suffer. It is safe to assume that if such were recognized as the law, no town would voluntarily assume corporate functions, and that every industrial and commercial interest would become paralyzed."

The recent case of *Bryant v. City of St. Paul*, 33 Minn. 289; s. c., 53 Am. Rep. 31, is directly in point. It was there held that a city was not liable for the misfeasance of members of the board of health selected by the city. Many authorities are cited in the note appended to that case, and from them it appears that the doctrine that public corporations, to whose officers governmental powers are delegated, are not responsible for the negligence of their officers in the exercise of these governmental powers. This doctrine has long prevailed in this State. *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Robinson v. City of Evansville*, 87 Ind. 334; s. c., 44 Am. Rep.

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770; *Faulkner v. City of Aurora*, 83 Ind. 130; s. c., 44 Am. Rep. 1; *City of Lafayette v. Timberlake*, 88 Ind. 330.

We have many cases holding that counties, townships and cities are instrumentalities of government, and it must therefore be true that where they act simply as the local government they act for the State. As the State is not liable for the acts of its officers, neither can the public corporations be held liable for the acts of its officers in the exercise of political powers. *Robinson v. Schenck*, 102 Ind. 307; *Justice v. City of Logansport*, 101 Ind. 326; *Kistner v. City of Indianapolis*, 100 Ind. 210.

There is no more reason for holding counties liable for the negligence of the commissioners in the exercise of the governmental functions delegated to them, than there is for holding cities liable for the acts of their firemen or police officers, or for holding counties and townships responsible for the torts of sheriffs and constables. In providing for the care of the poor, a police power which resides primarily in the sovereignty is exercised, and neither the sovereign nor the local governing body to whom such a power is delegated is responsible for the misfeasance of its officers.

Judgment affirmed.

**ELKHART MUTUAL AID, BENEVOLENT AND RELIEF ASSOCIATION
v. HOUGHTON.**

(103 Ind. 233.)

Insurance — life — interest.

A grandfather insured his life for the benefit of his grandson with whom he lived. *Held valid.**

ACTION on a life insurance contract. The opinion states the case. The plaintiff had judgment below.

J. M. Vanfleet and G. W. Beeman, for appellant.

J. S. Bender, A. I. Gould and B. D. Crawford, for appellee.

ZOLLARS, J. Appellee's right to recover rests upon two certificates of membership issued by appellant. These certificates are, in

* See note, 52 Am. Rep. 135.

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legal effect, policies of insurance upon the life of James Mitchell. So far as concerns any question involved in this case, the rules of law which govern ordinary policies of insurance are applicable here. Appellee declared upon these certificates and made them a part of his complaint. In each of them, appellee is named as the payee and beneficiary. The portions of each of the certificates necessary to be set out here are as follows: "This certifies that James Mitchell has paid \$10, the amount required on application, and has covenanted and agrees to pay \$1.50, as an assessment upon the death of any member, or the maturity of any certificate. He is therefore and hereby constituted a member and entitled to participate in the benefits of the Elkhart Mutual Aid, Benevolent and Relief Association. * * * This certificate entitles James E. Houghton, his heirs or assigns, within ninety days after presentation of satisfactory proof of the death of said member, to \$1,000, or so much thereof as may be realized from one assessment, not exceeding \$1,000, payable at the home office of said association in the city of Elkhart. * * *

7. This association will hold no reserve fund, and all losses will be paid from moneys derived from mutual assessments."

The complaint avers the death of James Mitchell, the proof of his death, and the refusal of appellant to pay the amounts named in the certificates or any part thereof, and its refusal to order or make any assessment upon the members of the association to raise the required sum or any part of it.

[A minor point omitted.]

The only other alleged error by counsel is the giving of the fifth instruction by the court below. It is as follows:

"Much has been said about an insurable interest in the life of another. Upon this question, and as a matter of law, I instruct you that a grandson, with whom a grandfather resides, has an insurable interest in the life of the grandfather; and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it."

[Minor considerations omitted.]

The fair interpretation of the instruction complained of, taken as a whole, and the one a jury would be most likely to put upon it, is we think, that if a grandfather procures an insurance upon his life in favor of a grandson with whom he lives, the grandson will have such an insurable interest in the life of the grandfather as that the policy will not be invalid in the absence of fraud, and as applied to

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this case, that the grandson may maintain an action upon the policy. Thus interpreted the instruction clearly does not enunciate an erroneous proposition of law, and in the state of the record it must be presumed that it was applicable to the evidence.

The evidence may have been that the grandfather, James Mitchell, procured the policies of insurance, paid the premiums, and in good faith and for cause had them made payable to the grandson, appellee, as the beneficiary. And so, the grandfather may have been indebted to the appellee.

In the case of *Provident Life Ins. and Investment Co. v. Baum*, 29 Ind. 236, one brother insured his life in favor of another. In one paragraph of the complaint it was averred that the brother was made the beneficiary, in consideration of love and affection. No interest of a pecuniary nature was shown. The court also charged the jury that it was wholly immaterial under the evidence in the case, whether the beneficiary had or had not any interest of a pecuniary nature in the life of the assured. This court, in holding the instruction to be correct and the complaint good, said: "The position assumed by the appellant, in argument, that this policy is one of indemnity, and that the appellee must show an interest in the life of the assured, does not, we think, arise in this case. The policy in terms declares that the company insures Americus Baum against loss of life in the sum of \$3,000. It cannot be questioned that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased, of the sum so contracted to be paid, it does not concern the insurers. The appellant contracted with the insured to pay the money to the appellee, and upon such payment being made, it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured." The learned counsel for appellant think that this case is, in principle, overthrown by the case of *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 313. We do not think so. In that case, Hazzard, for a nominal consideration, had the policy upon the life of one Cone as-

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signed to him, and took the assignment as a mere matter of speculation. Upon this ground, the assignment was condemned as being opposed to public policy. The learned judge who wrote the opinion in that case also wrote the opinion in the later case of *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, in which the case of *Provident Life Ins. and Investment Co. v. Baum*, *supra*, was quoted from and approved. It was further said: "Doubtless also a person may take a policy upon his own life, and by the terms of the policy, appoint a person to receive the money in case of his death during the existence of the policy." The case of *Provident Life Ins. and Investment Co. v. Baum*, *supra*, was again approved in the late case of *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; s. c., 46 Am. Rep. 185, and distinguished from a case where a person, for his own benefit, procures a policy upon the life of another and pays the premiums. And it was held, that in such a case, the payee and beneficiary must aver in his complaint his insurable interest in the life of the assured, and that such averments need not be made by the beneficiary in a case where a person has procured a policy upon his own life, and appointed another, and had him named in the policy as the beneficiary.

In support of this distinction, the case of *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180, is cited. Mr. Bliss, in his work on Life Insurance, at section 26, says: "A person has undoubtedly an insurable interest in his own life, and that interest supports a policy, whether he makes the loss payable to himself, his executors, or his assigns, or to a nominee or appointee named in the policy. Nor is a policy obtained by one on his own life for the benefit of another, which latter advances the premium, necessarily void. The question is whether the policy was in fact intended to be what it purports to be, or whether the form adopted as a cover for a mere wager. If the plaintiff and the insured confederated together to procure a policy for the plaintiff's benefit, when he is not and does not expect to be a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void."

In the case of *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, Campbell obtained a policy of insurance upon his life for the use of a brother's wife. Want of interest in the beneficiary was the ground of defense. Upon this point the court said: "The policy in this case is upon the life of Andrew Campbell. It was

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made upon his application; it issued to him as 'the assured;' the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. Plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. * * * It was not necessary therefore that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured." This case is approved in *Stevens v. Warren*, 101 Mass. 564, where it is further observed that if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained. The same doctrine is announced in the case of *Olmsted v. Keyes*, 85 N. Y. 593, after a review of the authorities. See also *Fairchild v. North-Eastern Mut. Life Ass'n*, 51 Vt. 613; *Clark v. Allen*, 11 R. I. 539; s. c., 23 Am. Rep. 496; *Loomis v. Eagle L. & H. Ins. Co.*, 6 Gray, 396; *Lemon v. Phoenix, etc., Ins. Co.*, 38 Conn. 294.

In the case of *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, it was said: "A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband, and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend."

Again, in the case of *Aetna Life Ins. Co. v. France*, 94 U. S. 561, where a policy was upon the life of a person expressly for the benefit of his sister, the same court said: "We concur in the construction of the policy made by the court" (below), "and in the validity of the transaction. As held by us in the case of the *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*, 457, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any

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gift or grant, the transaction is entirely free from any such imputation. The direction of payment in the policy itself is equivalent to such an assignment."

These authorities are abundantly sufficient to show that the instruction under examination in this case, as applicable to the evidence as it might, and may have been under the issues, is not erroneous.

Judgment affirmed, with costs.

Judgment affirmed.

BOOR V. LOWREY

(108 Ind. 468.)

Abatement — malpractice.

An action against a surgeon for malpractice abates with the death of the defendant, whatever the form of the action. (*See note, p. 525.*)

ACTION for malpractice. The opinion states the case. The plaintiff had judgment below.

J. H. Mellett, E. H. Bundy, J. Brown, W. A. Brown, and R. Conner, for appellant.

T. B. Redding, D. W. Chambers and J. S. Hedges, for appellee.

MITCHELL, C. J. Isaac Lowrey brought this action against Luther W. and Frank C. Hess, to recover damages alleged to have resulted from the negligent and unskillful manner in which they set and treated his shoulder, which had been dislocated and fractured.

It is charged in the complaint, that the defendants were partners, engaged in the practice of medicine and surgery, and that the plaintiff, having sustained a fracture and dislocation of his shoulder, employed them, and they undertook, for a certain reward, to set, reduce and treat it, and that they executed their undertaking so negligently and unskillfully as that his arm and shoulder became and remain stiff, immovable and fixed, in an unnatural position; that in consequence of their negligence and unskillful treatment, he suffered and still suffers great pain, distress and impairment of health, and that he is permanently disabled from pursuing his usual

avocation. Incidentally, it is recited that in attempting to better and cure his arm and shoulder, he has expended \$300. Damages are laid at \$10 000.

While the cause was pending Luther W. Hess died, and his death was suggested on the record. Thereupon Walter A. Boor, administrator of his estate, was substituted as a defendant. Over the several objections of both defendants, the action was prosecuted to final judgment, resulting in a recovery against the estate of the one, and against the other personally for \$6,000.

First in the order of presentation and in importance is the question, whether after the death of Luther W. Hess, the action survived against his personal representative.

It is plainly enacted in the statute, section 282, that "A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person," etc.

The rule *actio personalis moritur cum persona*, is thus transformed from an ancient maxim of the common law into an express statutory declaration, except only in the cases provided for by its terms. It is said however that where a duty is founded upon contract, even though the breach of it may be in tort, an action *ex contractu* may, at the election of the person injured, be maintained, and that where the action is thus brought, it survives notwithstanding the statute. In support of this contention, *Staley v. Jamieson*, 46 Ind. 159; s. o., 15 Am. Rep. 285, and *Burns v. Barenfield*, 84 Ind. 43, are relied on. These were cases against surgeons for malpractice, and both turned upon the statute which requires actions for injuries to the person to be commenced within two years. In each it was held that the action was in form *ex contractu*, and that the statute limiting the time for the commencement of actions for injury to the person did not apply.

What the particular damages were which were claimed as the subject of the actions respectively does not clearly appear from the statement of the complaint in either case. It must be assumed however that the actions were for the recovery of special damages, which had relation to property. They were not therefore actions to recover for injuries to the person. If they were, the conclusions reached cannot be maintained.

This assumption would seem to be justified by an examination of the authorities upon which the decisions are made to rest. Those

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which support the conclusion reached are cases involving injury to personal property. *Dale v. Hall*, 1 Wilson, 281; *Burnett v. Lynch*, 5 B. & C. 589.

It may be that actions *ex contractu* are maintainable for the recovery of special damages resulting from a breach of duty founded on contract, even though injury to the person results. The action thus maintainable however is not, and cannot be predicated upon the personal injury, nor to recover damages resulting from injuries to the person. The action must involve injury to the estate, and not to the person. Where the primary cause of action is an injury to the person, and the damages sought to be recovered relate primarily to such personal injury, the statute which provides that actions to recover damages for injuries to the person die with the person of either party, cannot be abrogated by the mere form in which the action is brought.

The case of *Bradshaw v. Lancashire, etc., Ry. Co.*, L. R., 10 C. P. 189, affords an example of the instances in which actions sounding in tort may survive. In that case the declaration stated that the testator, a boot and shoe manufacturer had become a passenger on the defendant's railway, to be carried on a certain journey for a reward, and that they promised to take due care whilst carrying him as such passenger. Breach, that the defendants did not take care in carrying him, whereby he was injured, and incurred expense in medical attendance, and was prevented from attending to his business, and from personally conducting the same, and that great loss and damage was thereby occasioned to the personal estate of the testator. It was contended that because of the death of the testator the executrix could not maintain the action. But as the ground of the action was to recover damages which accrued to the estate of the testator in his life-time, such as medical and other expenses, and from injury to business resulting directly from the breach of the contract to carry, it was held the action survived.

Of the same character was the case of *Potter v. Metropolitan, etc., Ry. Co.*, 30 L. T. (N. S.) 765; s. c., 32 L. T. (N. S.) 36. In that case, after quoting from *Knight v. Quarles*, 2 Brod. & Bing. 102, to the effect that if through the default of a carrier, one sustains an injury to his person, whereby his means of improving his personal property were destroyed, his executors might sue, BRAMWELL, B., said: "Now here there has been a breach of contract, which has caused a loss, which has fallen upon the personal estate,"

and it was held that the action was maintainable to recover for such loss. Again, when the case came before the Exchequer Chamber, Lord COLERIDGE, C. J., said: "From a breach of the contract on the part of the defendants a loss or damage accrued to the personal estate of the plaintiff's testator." Accordingly it was held that where there was a promise and a breach of it in the life-time of the testators, resulting in an injury to his personal property, an action in *assumpsit* might be maintained to recover for such injury. So also it is said in 2 Williams Exrs., 876, 877: "If the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action at common law, to recover such damage, although the action is in some sort founded on a tort." See also *Tichenor v. Hayes*, 41 N. J. L. 193; s. c., 32 Am. Rep. 186.

Thus much has been said to limit the cases of *Staley v. Jameson*, *supra*, and *Burns v. Barenfield*, *supra*, to the class of actions to which they were doubtless intended to have application.

It is not necessary that we should determine the particular character of special damage to property which might be recoverable in an action on contract where injury to the person was an incident. It is enough to say this action was brought primarily to recover for injury to the person. That an action, the purpose of which is to recover for an injury to the person, cannot be maintained after the death of the person committing the injury, is we think supported by all the authorities, and this too regardless of the form in which it is brought.

In *Stebbins v. Palmer*, 1 Pick. 71; s. c., 11 Am. Dec. 146, it was held that an action for breach of promise of marriage would not survive against the personal representative of the promisor. WILDE, J., said: "The distinction seems to be between causes of action which affect the estate, and those which affect the person only; the former survive for and against the executor, and the latter die with the person."

Following this case, COLT, J., said, in *Kelley v. Riley*, 106 Mass. 339; s. c., 8 Am. Rep. 336, a similar case: "The action could not be continued to summon in the administrator, because as no special damage is alleged, it does not survive."

In the later case of *Chase v. Fitz*, 132 Mass. 359, which was an action of the same complexion, in which an attempt was made to charge special damage, it was held that the neglect or refusal to

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perform an invalid executory contract could not constitute a basis for special damage. After defining, to some extent, what was meant by the phrase "special damage," as used in the class of cases to which this belongs, it was held that the action did not survive against the personal representative. See also *Smith v. Sherman*, 4 Cush. 408; *Grubbs v. Sutt*, 32 Gratt. 203; s. c., 34 Am. Rep. 765; *Dillard v. Collins*, 25 Gratt. 343. In the case of *Wade v. Kalbfleisch*, 58 N. Y. 282; s. c., 17 Am. Rep. 250, which was an action for breach of marriage contract, brought in form *ex contractu*, the court, CHURCH, C. J., said: "Although in form this action resembles an action on contract, in substance it falls within the definition of the exception, as an action on the case for personal injuries.

* * * The controlling consideration is, that it does not relate to property interests but to personal injuries." In that case it was intimated that as the cause of action was for personal injuries, and as it was indivisible, if the personal features of the action were abandoned, leaving nothing but the incidents, special damages were not recoverable. *Zabriskie v. Smith*, 13 N. Y. 322; s. c., 64 Am. Dec. 551. In *Lattimore v. Simmons*, 13 Serg. & R. 183, the same question was involved. In that case, as in this, the action had been brought in the life-time of the contracting parties. The defendant having died pending the action, the question was whether it survived against the executors. TILGHMAN, C. J., in the course of the opinion said: "But the counsel for the plaintiff rely on the contract in this case, and on some general *dicta* that all actions founded on contract survive. This position is too general. If true, it must extend to contracts implied as well as expressed. Suppose the case of a physician or surgeon, who by unskillful treatment injures the health of a patient. Here is a breach of an implied contract; and yet it will hardly be contended, that in case of death the cause of action would survive. It seems reasonable therefore to confine the survivor of action to cases in which actual property is affected, even though there be an express contract." So too in the case of *Chamberlain v. Williamson*, 2 M. & S. 408, Lord ELLENBOROUGH said: "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it. * * *

All injuries affecting the life or health of the deceased, all such as

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arise out of the unskillfulness of medical practitioners, * * * would be breaches of the implied promise by the persons employed to exhibit a portion of skill and attention. We are not aware however of any attempt on the part of the executor or administrator to maintain an action in any such case.

The case of *Vittum v. Gilman*, 48 N. H. 416, was an action against the personal representative of a deceased surgeon, and is directly in point. In that case it was said: "It is generally true that a cause of action arising *ex contractu* survives against the executor; and it is generally true that a cause of action arising *ex delicto* dies with the wrong-doer. In both cases there are well established exceptions. In respect to the latter, if the offender acquires no gain to himself at the expense of the sufferer, as by beating or imprisoning a man, or by slander, the cause of action does not survive; but if by the wrong, property is acquired by the wrong-doer whereby his estate is benefited, an action in some form will lie against the executor to recover the value of the property." This case was approved and followed in the later case of *Jenkins v. French*, 58 N. H. 532. In this last case it was held that where the cause of complaint is for injury to property, to which a personal injury is merely an incident, the action survives, but where the cause of action is for an injury to the person, and property is merely incidentally affected, it does not survive. To the same effect is *Wolf v. Wall*, 40 Ohio St. 111.

In the case under consideration, the cause of action stated in the complaint, and for which damages are claimed, is the injury to the person of the plaintiff. The injuries recited which might be classed as injuries affecting property are merely incidents growing out of the injury to the person. In whatever form an action might be brought to recover for such injuries, it must be held to abate with the death of the defendant, as well within the common-law maxim as within the express terms of section 282, R. S. 1881.

It might well be said within the holding in *Goble v. Dillon*, 86 Ind. 327; s. c., 44 Am. Rep. 308, that the action was brought in form *ex delicto*, but we choose to put it on the broader ground, that regardless of the form in which the action is brought, since the injury for which a recovery is sought is an injury to the person, it cannot survive the death of the defendant.

[Other considerations omitted.]

For the errors indicated the judgment is reversed with costs,

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with instructions to the court below to dismiss the action as to Walter A. Boor, administrator, etc., and to set aside the judgment and grant a new trial as to Frank C. Hess, and for further proceeding in accordance with this opinion.

ELLIOTT, J. A breach of contract, although in computing the damages it may be necessary to estimate injuries to the person, as for instance, if a steam engine should be sold under a fraudulent warranty, but because of a defect constituting a breach of the warranty, the purchaser should have his arm blown off, this fact might be taken into consideration in computing damages. It is my opinion that the statute applies only to cases of pure torts unmixed with any element of contract, and does not deny a recovery for damages resulting from a breach of contract, although the damages may arise from a bodily injury.

I concur however in the general conclusion reached, for the reason that I regard the complaint as in tort and not in contract. If the complaint had been in contract, then as it seems to me, the injury to the person of the plaintiff arising from the breach of the implied contract to treat the arm with skill and care might have constituted an element in the admeasurement of damages.

ELLIOTT and ZOLLARS, JJ., dissented.

NOTE BY THE REPORTER. — The subject of survival and abatement of actions was very exhaustively treated by Guy C. H. Corliss, in 83 Albany Law Journal, 184, 204. Some portions of Mr. Corliss' articles are as follows:

Actions ex contractu — injury merely personal. — The rule that actions *ex contractu* survive in favor of and against personal representatives is subject to the qualification that a cause of action arising out of a contract, express or implied, will not survive where the damages sustained by such breach are personal in their nature, and do not affect property rights or interests — as pain of body, anguish of mind, injury to character, or deprivation of liberty. *Chamberlain v. Williamson*, 2 M. & S. 409; *Bradshaw v. Ry. Co.*, L. R., 16 C. P. 189; *Stebbins v. Palmer*, 1 Pick. 71; *Kelly v. Riley*, 106 Mass. 389; s. c., 8 Am. Rep. 385; *Chase v. Fitz*, 132 Mass. 359; *Lattimore v. Simmons*, 18 Serg. & R. 183; *Wade v. Kalbfleisch*, 58 N. Y. 282; s. c., 17 Am. Rep. 250; *Miller v. Wilson*, 24 Penn. St. 115; *Vittum v. Gilman*, 48 N. H. 416; *Jenkins v. French*, 58 N. H. 532; *Wolf v. Wall*, 40 Ohio St. 111; *Hovey v. Page*, 55 Me. 142; *Best v. Vedder*, 58 How. Pr. 187; *Smith v. Sherman*, 4 Cush. 408; *Potter v. Metropolitan, etc., R. Co.*, 80 L. T. Rep. (N. S.) 765; s. c., 32 L. T. Rep. (N. S.) 36; *Knights v. Quarles*, 2 Brod. & B. 102.

In *Chamberlain v. Williamson* the action was brought by an administrator to recover damages for breach of promise of marriage. The plaintiff recovered a judgment, but on motion to arrest the judgment, the King's Bench, after

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mature deliberation, decided that the cause of action did not survive the death of the plaintiff's intestate, and the motion was granted. The court, speaking through Lord ELLENBOROUGH, said: "If this action may be maintainable, then every action founded on an implied promise to a testator where the damage subsists in the previous personal suffering of the testator would be also maintained by the executor or administrator. All injuries affecting the life or health of the deceased—all such as arise out of the unskillfulness of medical practitioners—the imprisonment of the party brought on by the negligence of his attorney—all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware however of any attempt on the part of the executor or administrator to maintain an action in any such case."

The action in *Lattimore v. Simmons* was also an action for breach of promise. The court reached the same conclusion, holding that the death of one of the parties to the agreement to marry destroyed the cause of action arising from a refusal to perform the contract. TILGHMAN, C. J., writing the opinion, says: "It cannot be said that any injury has been done to the property of the plaintiff, nor is there any measure or standard for regulating the damages. But the counsel for the plaintiff rely on the contract in this case, and on some general dicta that all actions founded on contract survive. This proposition is too general. If true, it must extend to contracts implied as well as expressed. Suppose the case of a physician or surgeon who by unskillful treatment injures the health of a patient. Here is a breach of an implied contract; and yet it will hardly be contended that in case of death the cause of action would survive. It seems reasonable therefore to confine the survivor of actions to cases in which actual property is affected, even though there be an express contract. A promise of marriage is undoubtedly a contract, though one of a singular nature. By its breach the feelings of the injured party may be deeply wounded, but it is not perceived that his property is in any manner affected. * * * It affects the hopes, the feelings, the imagination, the minds of the parties without touching their property. And whether these hopes and feelings would have been justified or disappointed by the fulfillment of the contract, it is beyond the reach of human sagacity to decide. It is not pretended that in case of slander the action survives, yet there the mental feelings may be as severely afflicted as by the loss of marriage. No benefit accrued to the estate of the defendant by the mutual promise in this case."

The cases of *Wade v. Kalbfleisch*, *Grubb's Admr. v. Sult*, 82 Gratt. 208; s. c., 84 Am. Rep. 765; *Hayden v. Vreeland*, 8 Vroom, 372; s. c., 18 Am. Rep. 723; *Hovey v. Page*, *Stebbins v. Palmer*, *Smith v. Sherman*, were all actions for a breach of promise, and the same conclusion was reached by the court in each case—that the cause of action did not survive.

In *Vittum v. Gilman* the defendant was the personal representative of a deceased surgeon, and was sued as such for damages sustained by the plaintiff, growing out of an alleged failure on the part of the surgeon to treat his patient properly. The court ruled that the death of the defendant was fatal to a recovery. To same effect are *Jenkins v. French*, *Wolf v. Wall*, *Boer v. Lowrey*, and *Best v. Vedder*.

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Actions ex contractu — involving personal and property interests.— It being shown to be the settled doctrine that an action *ex contractu* will not survive so far as merely personal injury to character is concerned, the next inquiry is whether such an action will survive to the extent of damage done to property or interest in property or generally to the estate of the person injured, in cases where the breach of the contract involves a personal injury also. All the authorities and *dicta* are in harmony on this proposition: that where the injury to property forms the chief item of damage and the substantial object of the action is to recover such damages, the cause of action survives to the extent of such damages, even though a personal injury has been sustained by the decedent by reason of the breach of the contract which forms the basis of the action. *Chamberlain v. Williamson*, *Lattimore v. Simmons*, *Hovey v. Page*, *Potter v. Metropolitan, etc., R. Co.*, 80 L. T. Rep. (N. S.) 765; s. c., 82 L. T. Rep. (N. S.) 86; *Bradshaw v. R. Co.*, L. R., 10 C. P. 189. See *Knight v. Quarles*, 2 Brod. & B. 102.

But whether an action for breach of contract survives, so far as damages to property are concerned, where such damages are only incidental to the personal injury which the violation of the contract causes, is involved in uncertainty. There are *dicta* on both sides of the question, but not much authority.

The English cases incline to the survival of the right to recover such damages. In *Bradshaw v. Ry. Co.*, a passenger was injured on defendant's railroad, and subsequently died. His executrix sued for damages sustained by her decedent, because of the failure of defendant to perform its implied contract to carry him safely. The court held that she might recover as damages to his property all medical expenses and loss sustained by reason of his inability to attend to his business. Here the real damage was the personal suffering caused by the injuries received. The other damage suffered might be considered as merely incidental. Still it is not apparent how much damage can be considered as merely incidental, as in many cases the bodily pain endured may be a minor factor in the determination of the question of damage sustained when compared with the loss to property. The case of *Potter v. Metropolitan, etc., R. Co.* is to the same effect.

In *Chamberlain v. Williamson*, Lord ELLENBOROUGH intimated that in that action, which was for breach of promise of marriage, special damages to property might have been recovered had they been specially pleaded.

In *Lattimore v. Simmons* the court expressed its opinion in favor of the survival of such damages when specially alleged. This action also was for breach of promise to marry. So was the case of *Hovey v. Paige*, where the court said that the "allegation of special damage which would cause the action to survive must be of damage to the property." But the court held that an allegation that plaintiff's intestate gave birth to a child of which the defendant was the father was not sufficient to show any damage to property. These cases are all that can be found in favor of the survival of merely incidental damages affecting property. See also *Kelly v. Riley*, 106 Mass. 839.

On the other hand there are numerous *dicta* and several authorities opposed to such a doctrine. In *Smith v. Sherman*, 4 Cush. 408, the Massachusetts Supreme Court, SHAW, C. J., writing the opinion, decided that expenditures

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made by the promisee relying upon a promise of marriage, and in making preparations for the consummation of the engagement, would not suffice to sustain a survival of an action for breach of the promise brought to recover them as damages after the death of the plaintiff, although such expenditures necessarily damaged her estate. The court held that they must be regarded as merely incidental to the promise to marry.

In *Wade v. Kalbfleisch* the action was for breach of promise to marry. The defendant died, and a motion was made to revive the action against his executors. The motion was denied, and on appeal the counsel for appellant argued that the personal elements of the action might be eliminated, and the action revived so far as the breach of the promise wrought an injury to the plaintiff's estate. The court, in answer to this claim, said: "The learned counsel suggested that upon a trial against executors or administrators the personal elements of the action might be eliminated, and a recovery confined to the pecuniary loss for support, dower, etc. There is no precedent for such a proceeding, and no principle on which it could be adopted." Aside from these considerations, suggested to show the novelty if not the absurdity of such a trial, the brief answer to this point is that the action is from its peculiar nature indivisible. If reviewed at all, it must be reviewed as an entirety. If its personal features are abandoned, the incidents only remain. The circumstances relating to the property and standing of the defendants are admissible upon the question of damages, but they are incidental and subordinate, and so complicated with personal injuries as to render the separation impracticable.

The purport of these decisions is that where the damage to property is caused by a personal injury, and would not have been suffered by the party injured had such personal injury not been sustained, then the mere existence of such an element of damage is not sufficient to create an independent cause of action, which will survive the destruction of the cause of action, for the personal injuries inflicted. The injury to property is but an element of damage. It does not constitute a substantive cause of action when separated from the personal injury sustained. Every personal injury results in two distinct kinds of damages to the person who suffered the injury — pain of body or mind and loss of property. Neither element of damage constitutes an independent cause of action. The only cause of action is for the personal injury. In such an action loss to property forms a portion of the damage suffered. But the loss of property has been occasioned by the personal injury, and would not have been sustained but for such personal injury. Expenses incurred in endeavoring to effect a cure and loss of time while sick are both dependent upon the existence of a personal injury. Where the injuries to property are entirely disconnected with any personal injury, in such a case the cause of action to recover the damages done to property survives, even though personal injury is inflicted at the same time and is attributable to the same cause which wrought damage to the property.

The rule is that all actions *ex contractu* survive except where no damage to property results. The English doctrine that the action does survive to the extent of damage to property has received the express sanction of the New York Court of Appeals, in *Hegerich v. Keddie*, 99 N. Y. 269; s. c., 53 Am.

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Rep. 25, where the court, citing *Bradshaw v. Ry. Co.*, L. R., 10 C. P. 189, say: "Such an action exists independently of the statute of 1847, and has been upheld in favor of representatives to the extent of giving damages for medical attendance and inability of the injured party to attend to business for the time intermediate his injury and death, when the accident occurred while travelling as a passenger upon the defendant's railroad. The action was there based upon the theory of a breach of contract to carry the passenger safely." See also opinion of Baron PARKE in *Beckman v. Drake*, 8 M. & W. 854.

This doctrine cannot be regarded as in conflict with *Wade v. Kalbfleisch*, which was an action for breach of promise. Such action is *sui generis*, and it is impossible to show any damage to property therein under legal rules. As was said by the court in that case, evidence of the value of defendant's property is received only to show what would have been the plaintiff's station in society had the promise been fulfilled. In all these cases where breach of promise was the subject of the action, no special damages to property were alleged, and it is clear that none could have been alleged. Moreover such an action partakes more of the nature of an action in tort than an action on contract. This is the trend of the argument of the court in that case, and in *Oregon v. Brooklyn Crosstown Ry. Co.*, 75 N. Y. 196; s. c., 31 Am. Rep. 459, that case is distinguished on that ground. That no damage to property can ever be shown in such an action was expressly declared by the court in *Wade v. Kalbfleisch*, 287: "The controlling consideration is that it does not relate to property interests, but to personal injuries. In *Zabriskie v. Smith*, 18 N. Y. 322; s. c., 64 Am. Dec. 551, DENIO, J., in delivering the opinion of the court, specifies this as an action where the damages consist entirely of personal suffering, and cannot therefore be revived."

Actions ex delicto.—All actions *ex delicto* did not abate at common law on the death of one of the parties. When the tort committed resulted in a pain to the tort-feasor, his executor or administrator could be made to reimburse the injured party to the extent of the benefit received by the defendant.

In *Hambly v. Trott*, Cowp. 871, Lord MANSFIELD said: "But when besides the crime property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor. * * * So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be chargeable."

In *Vittum v. Gilman*, 48 N. H. 416, the court said: "But if by the wrong, property is acquired by the wrong-doer whereby his estate is benefited, an action in some form will lie against the executor to recover the value of the property." To the same effect: *Oraath v. Plympton*, 13 Mass. 454; *Nettles v. D'Oyley*, 2 Brev. 27; *Arnold v. Lamar*, 1 N. C. L. Rep. 143. See also *Higgins v. Burn*, 9 Mo 500; *Penrod v. Morrison*, 2 P. & W. 126; *Coleman v. Woodworth*, 28 Cal. 567.

By the statute of 4 Edward III, ch. 7, an action "*de bonis asportatis*" was given executors to recover the value of property taken from their testators. See Wms. Ex'rs, 786-790.

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In this condition the law stood at the time of our separation from Great Britain. The Constitutions of many of the States have adopted the common law of England and statutes in force at the time the different Constitutions took effect. The law therefore in the several States on the subject of the survivability of actions for torts is to be determined by a reference to the doctrine stated by Lord MANSFIELD in *Hambly v. Trott*, the statute of Edward III already alluded to, and such statutory enactments as have been adopted by the respective States. In *Hegerich v. Keddie*, 99 N. Y. 260; s. c., 52 Am. Rep. 25, the court, after referring to the decision of Lord MANSFIELD and the statute of Edward III, say: "Under the clause of the Constitution making the rules of the common law the law of the State it must be held that these rules still determine the survivability of actions for torts except where the law has been specially modified or changed by statute."

The spirit of interpretation which has characterized the decisions of the courts in construing the early statute, and all subsequent enactments on the subject, has been one of great liberality in favor of the survival of actions. If an action fell within the spirit of the law it was held to survive, although the literal interpretation of the statute would not comprehend it.

In *Wilson v. Knubley*, 7 East, 134, the court held that the word "trespass" was to be construed as relating not merely to a technical trespass, but included any act by which the value of property was lessened. Lord ELLENBOROUGH said: "It is a very ancient statute, passed at a period when no great precision of language prevailed, and the body of the act does not speak of actions of trespass, though the instance put is proper for such an action, but it speaks of actions for a trespass done to the testator's goods, and it enacts that executors in such cases shall have an action against the trespassers, apparently using the word trespass as meaning a wrong done generally and the trespassers as wrongdoers." And in *Baker v. Crandall*, 78 Mo. 584; s. c., 47 Am. Rep. 126, the court held that this statute was sufficiently comprehensive in spirit to include an action for deceit, and that the statutes of that State on the subject of the survivability of actions, which are the same as the New York statutes, were merely declaratory of the law as enacted by the act of 4 Edward III. See also *Potter v. Van Vranken*, 86 N. Y. 267, and *Bishop's case*, 1 Anderson, 241.

The same liberal spirit has influenced the courts of the different States where the word trespass or a similar expression is used in the statute declaring what actions shall survive. *Ten Eyck v. Runk*, 81 N. J. L. 428; *Tichenor v. Hayes*, 41 N. J. L. 193; *Fried v. New York, etc., R. Co.*, 25 How. Pr. 287; *Wither v. Brooks*, 65 Me. 18; *Aldrich v. Howard*, 8 R. I. 125; *Hooper v. Gorham*, 45 Me. 212; *Nutting v. Goodridge*, 46 Me. 81.

It will be seen that unless the language of the statute imperatively requires such a construction, it will be interpreted as excluding all injury to feelings and all bodily pain suffered. The courts will not presume that it was the intention of the legislature to confer upon a personal representative a cause of action for an injury that had in no manner affected the estate of the decedent unless the words of the act preclude any other construction.

New York statutes.—The New York statute provides that actions "for wrongs done to the property, rights or interests of another" shall survive.

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This statute has been repeatedly before the New York courts for construction, and the result of the decisions is that in spite of the comprehensive language used, it is held to ordain the survival of actions for wrongs done merely to property or interests in property.

In *Oregin v. Brooklyn Crosstown R. Co.*, 75 N. Y. 192; s. c., 81 Am. Rep. 459, the court said with reference to this act: "The rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished."

In *Hegerich v. Keddie*, 99 N. Y. 264; s. c., 52 Am. Rep. 25, this language is quoted with approval. In this case it was held that the cause of action conferred by statute upon the representatives of a person whose death has been caused by the negligence of another would not survive against the representatives of the person whose carelessness caused the death. The decision was based upon three propositions: First, that the cause of action was created by statute, and was not the extension to the representatives of a cause of action vested in the deceased; second, that no personal interest in the life of another is a property interest; and third, that no person has such an interest in his own life as will constitute property in any legal sense.

The statute as construed decrees the survival of an action for injuries to property interests only. The interest which a man has in the prolongation of his own life is not a property interest. The interest which a person has in the continuance of the life of a relative is not a property interest. *Green v. Hudson River R. Co.*, 28 Barb. 9; *Whitford v. Panama Co.*, 23 N. Y. 465; *Hegerich v. Keddie*. In the last case the court say, at page 266: "It would seem unnecessary to cite additional authorities to the effect, that as the law stood at the adoption of the statute, neither a husband nor wife had such an interest in the life of their respective consorts as subjected a person through whose negligent act it was taken to the charge of injuring any property rights possessed by them." The interest which one has in the life of another not being a property interest, the action would not survive under the statute considering the action as one newly created; and on the other hand the interest which one has in his own life not being a property interest, the action would not fall within the statute, even assuming it to be but a devolution upon the representatives of a cause of action existing in favor of the decedent before his death. But no cause of action for causing death can exist in favor of the party himself before his death. How then can it be said to pass to his representatives?

Under this statute the following actions have been held to abate by death: An action for seduction, *People v. Tioga Common Pleas*, 19 Wend. 73; *Holliday v. Parker*, 23 Hun, 71; an action for breach of promise to marry, *Wade v. Kalbfleisch*, 58 N. Y. 286; s. c., 17 Am. Rep. 250; for fraud in inducing one to marry another who has no power to contract a valid marriage, *Price v. Price*, 75 N. Y. 244; s. c., 81 Am. Rep. 463; or to recover damages for loss of support by the wife under the Civil Damage Act, *Moriarty v. Bartlett*, 99 N. Y. 651; or to recover damages sustained by extending credit to one who is insolvent under fraudulent representations respecting his financial standing made by a third person, *Zabriske v. Smith*, 18 N. Y. 822; s. c., 64 Am. Dec. 551. This last

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case cannot be regarded as sound. It was declared by the court in *Fried v. N. Y. C. & H. R. R. Co.*, 25 How. Pr. 285, to have been incorrectly decided, and that the court overlooked the statute. It is certainly overruled by the decision in *Haight v. Hayt*, 19 N. Y. 464, where the court held that a cause of action for damages sustained by reason of fraudulent representations as to an incumbrance upon real property survived against the personal representatives of the party making the representations. To same effect *Bond v. Smith*, 4 Hun, 48. Are property interests injured any more when by reason of fraudulent statements a person has been compelled to pay an incumbrance upon property than when because of such a statement he has lost money or property by giving credit to an irresponsible party? The decisions which hold that an action for seduction does not survive under the statute are likewise unsound. Are not property interests directly injured by the loss of service, and the expenses attending confinement? The case of *Cregin v. Brooklyn Crosstown R. Co.*, is conclusive on this point.

In *Scott v. Brown*, 24 Hun, 620, the court held that a cause of action against defendant's testator for damages to plaintiff by causing the sickness of five and the death of three of his children, by negligently repairing sewer pipe, whereby sewer gas was suffered to escape and the children poisoned, survived against testator's executrix as to damages to plaintiff's property, expenses necessarily incurred during their sickness, etc.

Massachusetts statutes.—The Massachusetts statute provides for the survival of actions for damages done to "real or personal estate." These words have uniformly been construed by the Supreme Court of that State as relating to and including only actions for damage to specific real or personal property.

In *Read v. Hatch*, 19 Pick. 47, the court decided that an action for fraudulently representing an irresponsible person to be solvent, on the strength of which credit was extended to the insolvent and damages sustained by the creditor, would not survive the death of the defendant.

In *Cummings v. Bird*, 115 Mass. 346, plaintiff alleged that by reason of a libel by the defendant against him he lost a lucrative situation. He subsequently died, and the action was held to abate by his death.

In *Leggate v. Moulton*, 115 Mass. 552, the plaintiff averred that he was induced to part with his real estate by reason of certain fraudulent representations made by the defendant. The right to maintain the action was held to be destroyed by plaintiff's death, the court saying: "It is argued that within the meaning of the statutes this is a damage done to the estate of the intestate because she was induced by the fraud of the defendant to convey it to one who unjustly deprived her of the payment therefor. The statute however intended to give a remedy which should survive only for injuries of a specific character to real or personal estate, and does not include actions for damages for frauds committed upon the intestate by which she might have been induced to part with her property at less than its value, or so to conduct herself on account of the confidence reposed by her in the party thus deceiving her as to diminish her property."

Missouri statute.—The Missouri statute is the same as that of New York. In *James v. Christy*, 18 Mo. 162, it was held that an action against a common

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carrier by a father for damages on account of the death of his son survived. See also *Higgins v. Breen*, 9 Mo. 497. But see *Stanley v. Vogel*, 9 Mo. App. 100.

In *Baker v. Crandall*, 78 Mo. 584; s. c., 47 Am. Rep. 126, the court held that an action for deceit would lie under that statute, and even argued that the action would lie under the act of Edward III. This is opposed to the decision in *Zabriskie v. Smith*, and is in harmony with the ruling in *Haight v. Hayt*. Its soundness cannot be assailed.

Rule after verdict.—Where one of the parties to an action that abates on the death of either party dies after verdict and before judgment, the action does not survive, and no judgment can be entered. Of course, the judgment, if entered at all, must be entered in the name of the deceased party or against him, there being no authority to permit a judgment in tort to be entered in favor of or against the personal representatives of the decedent, and in the absence of special circumstances warranting the entry of the judgment *nunc pro tunc* as of a time anterior to the death of the deceased party, no judgment could be entered in favor of or against such deceased party. That the action abated in such a case was held in *Ireland v. Champneys*, 4 Taunt. 885; *More v. Bennett*, 65 Barb. 338; *Wood v. Phillips*, 11 Abb. Pr. (N. S.) 1.

But where the delay after verdict and before the entry of judgment is caused by the court, the court to prevent a wrong being done to the successful party by its own delay will direct that the judgment be entered as of the time when the verdict was rendered, and before the death of the deceased party. *Perry v. Wilson*, 7 Mass. 395; *Anonymous*, 1 Hayw. (N. C.) 500; *Long v. Hitchcock*, 8 Ohio, 274; *Gaines v. Coon*, 2 Dana, 231; *Kelley v. Riley*, 106 Mass. 841; *Twycross v. Grant*, 4 Com. Pl. Div. 40; s. c., 80 Eng. Rep. 393; *Ryghtmyre v. Durham*, 12 Wend. 245.

In *Springfield v. Worcester*, 2 Cush. 52, the court permitted a judgment under a penal statute to be entered subsequently to the repeal thereof where a verdict had been rendered before the repeal, and the entry of the judgment was delayed by the court reserving for consideration certain questions of law.

Condition on granting new trial.—In England the court, on granting a new trial in actions which do not survive, sometimes imposes upon the defendant the condition that the death of either party shall not work an abatement of the action. *Griffith v. Williams*, 1 Crompt. & Jer. 47; *Palmer v. Cohen*, 2 B. & Ad. 963. But in each of these cases it would seem that the granting of the new trial rested in the discretion of the court, and the new trial was awarded as a judicial favor or indulgence, and not as a matter of absolute right. It cannot be the law that where the defendant has an undeniable legal right to a new trial, the court can impose terms that death shall not cause the action to abate as a condition on which the new trial will be granted.

In *Griffith v. Williams*, the action was for breach of promise. On the hearing of a motion for a new trial it was urged that the application should be denied because the plaintiff had died since the entry of judgment, and that after the verdict had been set aside the action would abate. But the court replied to this argument that on granting the new trial it could impose upon the defendant the condition that on the new hearing the verdict and judgment should

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be entered as of the time when the first trial was had. The case of *Palmer v. Cohen* was an action for libel. The court reached the same conclusion. It will be noticed that in all the cases where such terms have been imposed the defendant has not been insisting upon a legal right, but has been before the court in the position of a suppliant, asking the indulgence of the court.

In *Ames v. Webbers*, 10 Wend. 576, the defendant in an action for an escape made an application to put the case over the term on the ground of the absence of a material witness. It appearing that defendant was afflicted with a fatal malady, the court required the defendant to stipulate that the action should not abate by his death before the next trial. On motion to set aside the stipulation given under this requirement, the court held that the condition was properly imposed.

In *Cox v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 414, the defendant moved to have the case put over the term. The court decided that the motion should be granted only on condition that the counsel for the defendant stipulated that in case of the death of the plaintiff before final judgment, the action should not abate. This stipulation was signed by the defendant's counsel. Subsequently the case was tried and plaintiff recovered a verdict, and judgment thereon was duly entered. The verdict and judgment were afterward set aside; and before another trial could be had, the plaintiff died. On the new trial defendant moved to dismiss the action on the ground of abatement by plaintiff's death. The stipulation was then offered in evidence and the motion denied. On appeal the Court of Appeals affirmed the decision of the court below. After reviewing the cases on the subject the court say: "These cases we think sufficiently establish the power of the court to annex the condition imposed in this case, and to make it effectual by allowing the case to proceed after the death of the plaintiff in his name, taking no notice of that fact." While the case does not disclose the order which fixed the terms in which the requirement to stipulate against abatement by death was incorporated, yet the court assumed all through the opinion that the giving of the stipulation was not the merely voluntary act of the counsel for defendant, but was executed under and in pursuance of the terms of the order which permitted the case to be put over the term. Indeed the court expressly refused to pass upon the validity of such a stipulation where there is no order requiring it to be given. "We are not called upon to consider or decide whether a bare agreement of parties not made in a pending litigation, or with the sanction of the court, that an existing cause of action which abates on the death of one of the parties shall survive, can be enforced." But in *Garlington v. Clutton*, 1 Call (Va.), 452, it was held that such an agreement is valid, and prevents the abatement of an action which would otherwise abate.

Rule after judgment.—After judgment the death of neither party abates the action so far as an appeal or writ of error is concerned. The defeated party may appeal, even though the action will abate after the judgment has been set aside. *Carroll v. Bowie*, 7 Gill (Md.), 84; *Burns v. Stanton*, 24 Miss. 580; *Walpole v. Smith*, 4 Blackf. (Ind.) 151; *Cox v. Whitfield*, 18 Ala. 788; *Gibbs v. Belcher*, 80 Tex. 80; *Wood v. Phillips*, 11 Abb. Pr. (N. S.) 1; *Wren v. Moss*, 7 Ill. 72; *Danforth v. Danforth*, 111 Ill. 286; *Thompson v. Central R. Co.*,

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60 Ga. 120; *Kimbrough v. Mitchell*, 1 Head, 589; *Comstock v. Dodge*, 48 How. Pr. 97; *Atlantic Dock Co. v. Mayor*, 58 N. Y. 64; *Spooner v. Keeler*, 51 N. Y. 527-536; *Shafer v. Shafer*, 30 Mich. 163.

In *Cox v. Whitfield*, the court says of a writ of error sued out by a defendant against whom a judgment in an action which does not survive is rendered: "The proceeding becomes a new action. The defendant below becomes the actor here, and the original cause of action has become merged in the judgment to reverse which is the object of the present action. If then the judgment which is complained of as erroneous survives, the cause of action as to the writ of error survives."

In *Wren v. Moss* the court decided that a wife against whom a decree of divorce had been granted, might after the death of her husband prosecute a writ of error to reverse the decree. The reasons for such a rule are stated with great clearness and precision in this case: "The plaintiff in error complains that she has been injured by an erroneous decree. If so she ought to find a remedy by writ of error; for although by the death of the complainant the parties were divorced and no further proceedings could be had, yet the mode of effecting the same object by a decree will, if erroneous, unjustly deprive the plaintiff in error of all right in dower or interest in the personalty. It is plain therefore that she may be greatly aggrieved by the decree if erroneous. If aggrieved she ought to find a remedy by appeal or writ of error." In that case all the parties who might be affected by a reversal of the decree were brought before the court. So they were in *Shafer v. Shafer*, 30 Mich. 163, where the appeal was heard after the husband's death. And in *Danforth v. Danforth* the court said in an action of the same nature, and in which substantially the same question was involved: "But where a decree of divorce has been improperly obtained, and the proceedings are erroneous, the party whose property rights have been injuriously affected by such decree ought not to be concluded by reason of the subsequent death of the other party. While both parties live, a writ of error lies to reverse an erroneous decree of divorce, the effect of which is to restore both parties to their former status of husband and wife in law; and after the death of one it ought to lie in favor of the other party, not for the same purpose, but to restore the survivor to his or her rights of property divested erroneously by the decree."

In *Shafer v. Shafer*, 30 Mich. 163, the court held that the wife might go on with an appeal granting a divorce although her husband had died since the rendering of the decree; and that the heirs and personal representatives must be made parties to the appeal.

The personal representatives of a person in whose favor a judgment has been rendered, but subsequently set aside, may seek by appeal to re-establish the original judgment, even after his death in a case where death abates the action. This was held by the New York Court of Appeals in *Wood v. Phillips*, 11 Abb. Pr. (N. S.) 1. The New York Code permits a judgment in an action sounding in tort to be entered after the death of either party where they both survive the rendering of the verdict. Code, § 763. The verdict in this case was rendered before death, but it was subsequently set aside and judgment was never entered. The Court of Appeals held that under the provision of the Code authorizing the

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entry of the judgment in the name of the deceased party, the verdict became assets, the same as a judgment under the common-law rule entered before death would become assets, and that the personal representatives were vested with the right to appeal for the purpose of reinstating the verdict set aside. But after the judgment which is binding on the defendant or his representatives is finally set aside or reversed, no new trial can be had, for then the case stands as though no trial had ever been had and no judgment ever entered, and of course the action abates. The parties are placed in the same situation they would have occupied had the case never been tried, and when the death of either party is established, the cause of action is forever gone. All of the cases enunciate this doctrine. *Cox v. Whitman*, 18 Ala. 737; *Harrison v. Moseley*, 31 Tex. 608; *Benjamin v. Smith*, 17 Wend. 208; *Wood v. Phillips*; *Comstock v. Dodge*, 43 How. Pr. 97; *Spooner v. Keeler*, 51 N. Y. 527-536; *Wren v. Moss*, 7 Ill. 72; *Danforth v. Danforth*, 111 Ill. 236; *Kelsey v. Jewett*, 84 Hun, 11. Of course the judgment is not destroyed by the death of either party. So long as that particular judgment stands, the action is not affected by the death of the plaintiff or the defendant. *Long v. Hitchcock*, 8 Ohio St. 274; *Taney v. Edwards*, 26 Tex. 224; *Gibbs v. Belcher*, 80 Tex. 80; *Cox v. Whitfield*, 18 Ala. 738. But it has been held that an award is not a judgment within the meaning of this rule, even though the statute provides that an award shall have the effect of a judgment and be a lien on real estate. *Miller v. Umbehower*, 10 Serg. & R. 81.

Action of divorce. — The action for divorce cannot be regarded as coming under the head of an action for a tort, but it has been held that the death of either party before final decree abates the action. *Ewald v. Corbett*, 32 Cal. 493; *Pearson v. Darrington*, 32 Ala. 257; *Swan v. Harrison*, 2 Coldw. 534; *Wren v. Moss*; *Danforth v. Danforth*; *McCurley v. McCurley*, 60 Md. 185; s. c., 45 Am. Rep. 717. The subject matter of such an action is the dissolution of the marriage relation existing between husband and wife. The effect which the decree of divorce has upon property interests is merely incidental. Courts do not entertain jurisdiction of divorce suits for the sole purpose of divesting inchoate rights in property growing out of the marriage relation. The only object of the action is to annul the status of the parties as husband and wife because one of them had forfeited his or her right to have it continued.

In *Danforth v. Danforth*, 111 Ill. 236, it was held that the defendant's death after trial, but before judgment, will not abate the suit, and that the right of one against whom a decree of divorce has been erroneously granted is not defeated by the death of the other party pending the appeal. The court said:

"But it is urged, that conceding the foregoing to be good law, it has no application to a suit for a divorce. It is claimed that the death of either party puts an end to all further legal proceedings. This is true where the death takes place before any final decree of divorce. *Ewald v. Corbett*, 32 Cal. 493; *Swan v. Harrison*, 2 Coldw. 534; *Pearson v. Darrington*, 32 Ala. 227. But where a decree of divorce has been improperly obtained, and the proceedings are erroneous, the party whose property rights have been injuriously affected by such decree ought not to be concluded by reason of subsequent death of the other party. While both parties live, a writ of error lies to reverse an erro-

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neous decree of divorce, the effect of which is to restore both parties to their former *status* of husband and wife in law, and after the death of one it ought to lie in favor of the other party, not for the same purpose, but to restore the survivor to his or her rights of property divested erroneously by the decree. On the reversal of a decree of divorce, the parties will be placed in a position they occupied before the decree was entered, and if one of them has died between the date of the decree of divorce and its reversal, the survivor procuring the reversal will be entitled to all rights of succession or dower, and the like, in the estate of the other, the same as if no divorce had ever been had. *Wren v. Moss*, 7 Ill. 72.

"If then the appellant could have prosecuted her appeal or writ of error to reverse the decree of divorce even after her husband's death, and thus remove the bar of that decree to the assertion of her property rights as widow of the deceased, no reason is seen why she may not do the same thing where her husband dies after the appeal is taken or writ of error brought, and after the cause is submitted. The most that can be said of the entry of final judgment after the death of the appellee is, that it was irregular and informal. No valid objection can be urged to its substantial justice."

Death having wrought what was sought to be accomplished by the action, nothing remains to warrant its continuance. It has been held that imprisonment for life abates an action for tort the same as death. *Freeman v. Frank*, 10 Abb. Pr. 871. If the death precedes the action and appears on the face of the complaint, the question of abatement may be raised by demurrer. *Leggate v. Moulton*, 115 Mass. 552; *Hegerich v. Keddie*, 99 N. Y. 258, or by plea in abatement or at the trial without any plea. *Baltimore, etc., R. Co. v. Ritchie*, 81 Md. 141.

But suppose the death occurs after the commencement of the action, when should the question be presented? That it may be raised on the motion to have the personal representatives of one of the parties made parties is clear. All of the authorities agree on this proposition. *Wade v. Kalbfleisch*; *Creglin v. Brooklyn Crostown R. Co.*; *Price v. Price*; *Moriority v. Bartlett*, 99 N. Y. 651; *Stokes v. Stickney*, 96 N. Y. 323.

But in those jurisdictions in which the mere death of a party where the cause of action survives does not abate the action, and where the personal representatives may in a proper case be substituted on motion, will the failure to oppose the motion on the ground that the cause of action does not survive, and the failure to appeal from the order if it permits the continuance of the action in favor of or against the personal representatives, operate as a bar to the raising of the question on the trial? It would seem not.

Action of replevin. — At common law and under the statute 4 Edward III, the death of the defendant abated an action for replevin whether pending or not yet commenced. *Potter v. Van Vranken*, 80 N. Y. 627; *Hambly v. Trott*, Cowp. 871; *Mellen v. Baldwin*, 4 Mass. 871; *Lahey v. Brady*, 1 Daly, 443; *Webber's Ex'rs v. Underhill*, 19 Wend. 447; *Burkle v. Luce*, 1 N. Y. 163; *Hopkins v. Adams*, 6 Duer, 685.

In *Roberts v. Marsen*, 23 Hun, 486, the court, after referring to the change which has been wrought in the law of the survivability of actions by the New

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York statute, said with regard to the abatement of that action which was an action of replevin: "If it was necessary for the determination of this appeal to decide the question we should hesitate long before holding that the death of Edward T. Marsen (the defendant) caused the abatement of the action." That this opinion of the court is correct cannot be doubted. But even at common law the action of replevin might be maintained against the personal representatives of the person who had wrongfully possessed himself of the property in his life-time, provided such personal representatives themselves were in possession of the property. *Mason v. Dixon*, Sir Wm. Jones Rep. 178; *Potter v. Van Vranken*, 86 N. Y. 627. In the first case the court said: "But if the executor have the goods in his possession then detinue would lie against him upon his own possession." It seems to be undisputed that the death of the plaintiff or of the party from whom the property is taken will not work the destruction of an action of replevin. *Potter v. Van Vranken*; *Lahey v. Brady*; *Countess of Rutland's case*, 1 Cr. Eliz. 878; *Berwick v. Andrews*, 2 Ld. Raym. 978-4; *Bishop of Coventry and Litchfield's case*, 1 Anderson R. 241. In this last case the court pursued the same liberal course in construing the act of Edward III, as was adopted in *Wilson v. Keesbley*, 7 East, 184, by Lord ELLENBOROUGH. The court said that where the testator had been wrongfully deprived of his property, it was the spirit and meaning of the act that the executor should have any action which the testator could have had if living. The law on this whole subject of the abatement and survivability of actions of replevin is clearly summed up by Chief Justice PARSONS in *Mellen v. Baldwin*, 4 Mass. 480, which may be considered the leading case in this country on the subject. He says: "In replevin the ground of action for the plaintiff is his property, either general or special, and a tortious violation of his right of property by the defendant. The defendant is therefore charged with a tort which cannot survive against his executor or administrator. * * * But the executor or administrator of a plaintiff in replevin may come in and prosecute, because the chattels of the deceased being vested in him by the law, he might sue a replevin against the defendant who had unlawfully taken them and this within the equity of the statute of 4 Edward III."

In *Johnson v. Elwood*, 82 N. Y. 862, a novel question was decided. The action was brought to restrain defendant from entering upon certain property claimed to be owned by plaintiff and from cutting timber thereon. The defendant died and the action was subsequently dismissed for want of prosecution. Defendant's administratrix then moved for an order of reference to ascertain and assess the damages which defendant had sustained by reason of a temporary injunction which had been granted in the action. On appeal the court held that the action being purely personal in its nature, did not survive the death of the defendant, and that therefore the court had no authority to order that the defendant's damages be assessed. The court said: "The plaintiff claims that no order of reference could be made in this case, for the reason that the action abated in consequence of the death of the defendant before any trial, and that the cause of action did not survive. It is evident that if the plaintiff had succeeded in maintaining a right to the injunction order after the defendant's death, no judgment could have been entered against the defend-

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ant; nor is it apparent in what manner his representatives could have been restrained in this action. The acts of the defendant, in interfering with the lots in question, were of a character purely personal to himself, and the restraint upon him by injunction was at an end upon his decease, and the maxim, *actio personalis moritur cum persona* applies. As the action became abated and did not survive upon the death of the defendant against his heirs or representatives, there was no authority in the court to direct its discontinuance or to make any other order than that it be deemed abated by such death. It follows from what has already been remarked, that the order of reference to ascertain the damages cannot be sustained without a violation of a well-settled and sound rule of law, and it would therefore be impossible to continue the action for any purpose."

See *Russell v. Sunbury*, 37 Ohio St. 372; s. c., 41 Am. Rep. 523; *Diversey v. Smith*, 103 Ill. 378; s. c., 42 Am. Rep. 14; *Lewis v. St. Louis, etc., R. Co.*, 59 Mo. 495; s. c., 21 Am. Rep. 385.

The following also do not survive: Action for enticing away another's servant, *Huff v. Watkins*, 20 S. C. 477. Against a trustee of a corporation for a statutory penalty for failure to file a report, *Stokes v. Stickney*, 96 N. Y. 323. For surgical mal-practice, *Jenkins v. French*, 58 N. H. 532.

An action for being removed from office without a hearing survives. *Hines v. Dist. of Columbia*, 4 MacArth. 141.

In *Witters v. Foster*, Circuit Court, Vermont, March 13, 1886, 26 Fed. Rep. 737, it was held that under the laws of Vermont, an action against a director of a national bank for negligent performance of duty in not requiring a bond from the cashier, and otherwise mismanaging the affairs of the bank, abates by his death, and cannot be revived against his administrator. The court said: "The statutes of Vermont applicable to this case provide that actions of trespass and trespass on the case, for damages done to real and personal estate, shall survive. Rev. Laws, § 2133. This statute is not any more broad than the English statute of 4 Edw. III, chap. 7. * * * The ground of the orator's claim against the intestate was his personal and official guilt, not the misappropriation or misapplication of any property of the bank in his possession, nor the interference by him with any property of the bank in possession or in action, but the omission of duties which, if performed, might benefit the assets of the bank. In *Hambly v. Trott*, Cowp. 372, Lord MANSFIELD said: 'All private criminal injuries or wrongs as well as public crimes are buried with the offender.' There are many cases under such statutes where it is held that actions resting upon such personal wrong-doing, although followed by pecuniary damage, do not survive. *Baily v. Baily*, 1 Ld. Raym. 71, which was for neglect to return a cow taken for agistment; *Stebbins v. Palmer*, 1 Pick. 71, which was for breach of promise of marriage; *Holmes v. Moore*, 5 Pick. 257, which was for diverting water from a mill; *Read v. Hatch*, 19 Pick. 47, which was for fraudulently recommending a trader to credit; *Barrett v. Copeland*, 20 Vt. 244, which was for making a false return as constable; *Henshaw v. Miller*, 17 How. 213, which was for a false representation as to credit; and *Winhall v. Sawyer*, 45 Vt. 466, which was for unlawfully transporting a pauper into a town to charge the town with her support. There are no cases which have been cited or noticed that are really to the contrary."

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(108 Ind. 515.)

Bankruptcy — discharge — new promise.

A liability discharged in bankruptcy is not revived by the debtor's saying: "I do not intend you shall lose it; I will make it all right." (*See note, p. 543.*)

ACTION for breach of covenant. The opinion states the case. The plaintiff had judgment below.

B. M. Cobb and C. W. Watkins, for appellant.

J. B. Kenner, J. I. Dille and L. M. Ninde, for appellee.

NIBLACK, J. Prior to 1873 one Corey owned a tract of land in Huntington county, and while such owner he executed a mortgage upon it to one Haynes. Afterward William H. Meech, the appellant in this cause, became the owner of the same tract of land as the remote grantee of Corey. During the year 1873 Meech sold and by warranty deed conveyed the land to William Lamon, the appellee. In December, 1877, Haynes commenced an action in the Huntington Circuit Court against Lamon to foreclose his mortgage, and thereafter obtained a decree of foreclosure and an order for the sale of the land. In March, 1879, the land was sold at sheriff's sale, and Haynes became the purchaser, receiving a sheriff's deed therefor after the expiration of a year from the time of his purchase.

This action was commenced by Lamon against Meech in October, 1881, for a breach of the covenants contained in the latter's deed.

Meech answered that on the 30th day of April, 1878, he was adjudged a bankrupt, and on the 31st day of December, 1879, had received his final discharge in bankruptcy. Lamon replied an express promise by Meech to pay the damages he had sustained after the latter's discharge in bankruptcy.

A jury returned a general verdict in favor of Lamon, and answered special interrogatories as follows:

"First. When was the new promise made, if any, to pay the indebtedness in suit? Answer. Promise made after defendant filed his petition in bankruptcy.

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“Second. What was the precise language of the new promise? Answer. ‘I do not intend you shall lose it; I will make it all right.’

“Third. To whom were the words spoken? Answer. They were spoken to the plaintiff in the presence of L. P. Milligan.”

The bill of exceptions shows that these interrogatories were properly submitted to the jury by the court, and that is sufficient to establish the fact here that they were so submitted.

Meech moved for judgment in his favor upon the answers to the special interrogatories, notwithstanding the general verdict, but his motion was overruled. He then moved for a new trial upon the ground, amongst others, that the evidence was insufficient to sustain the verdict, but that motion was also denied.

In the case of *Shockey v. Mills*, 71 Ind. 288; s. c., 36 Am. Rep. 196, this court held, in general terms, that the promise by which a discharged debt is revived must be clear, distinct, and unequivocal, as well as certain and unambiguous; that there must be an expression by the discharged debtor of a clear intention to bind himself to pay the debt; that the expression of an intention to pay the debt is not sufficient; that there must be an actual promise before the debtor is bound; that an intention is but the purpose which a man forms in his own mind; that a promise is an express undertaking or agreement to carry the purpose thus formed into effect, and that a promise to revive a discharged debt must be express, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt.

In the case of *Allen v. Ferguson*, 18 Wall. 1, the facts were, that Ferguson, who was a citizen of the State of Arkansas, had previously to the 7th day of January, 1868, filed his petition in bankruptcy, and on that day, which was while the proceedings were pending upon his petition, he wrote to Allen & Co., the holders of a promissory note executed by him, a letter giving a statement of his business affairs, and of the causes which had led to his applying for the benefit of the Bankrupt Act. In that letter he said: “Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay,” adding in a postscript: “All will be right betwixt me and my just creditors.” Ferguson in due time received his discharge in bankruptcy. Allen & Co. afterward sued him in the Circuit Court for the Eastern District of Arkansas upon the promissory note which they held against him. Ferguson appeared and pleaded

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his discharge in bankruptcy in bar of the action. Allen & Co. replied a new promise in writing, setting out and relying upon Ferguson's letter of January 7th, 1868, above referred to, as containing and amounting to such a new promise.

A demurrer was sustained to the replication, and upon an appeal to the Supreme Court of the United States, it was held that the debt was not revived by Ferguson's letter; that the supposed promise contained in it was not sufficiently clear, distinct and unequivocal to operate as a revival of the debt. The doctrine of this case is fully sustained by *Blumenstiel Bankruptcy*, 552, and by *Bump Bankruptcy*, 748, and the cases respectively cited by those authors.

We think the general purport of the assurances given by Meech to Lamon in this case were no stronger than those given by Ferguson to Allen & Co., and are hence of the opinion that the Circuit Court erred in refusing to render judgment in favor of Meech, notwithstanding the general verdict. If the case rested here primarily upon the refusal of the Circuit Court to grant a new trial, we would feel constrained to hold that the verdict was not sustained by the evidence. The finding as to the exact words which constituted the supposed new promise did not embrace all the words uttered by Meech at the time to which the finding referred, and which had reference to the amount of purchase-money which Lamon had paid for the land.

The evidence showed that Meech added to the words quoted in the finding, "But I can't do any thing now," and these additional words served to modify and to limit the import of those which immediately preceded them. But as Meech became entitled to a judgment in his favor on the answers to the special interrogatories, there is no sufficient reason for requiring him to incur the hazard of a new trial.

The judgment is reversed with costs, and the cause is remanded with instructions to the court below to enter judgment in favor of Meech upon the answers to the special interrogatories notwithstanding the general verdict.

ON PETITION FOR A REHEARING.

NIBLACK, J. A petition for a rehearing has been filed on behalf of the appellee, controverting the conclusion reached by us at the former hearing, and insisting that both the arguments used and

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the inferences drawn in support of that conclusion are against the weight of authority, and especially inconsistent with the doctrine of the recent case of *Hubbard v. Farrell*, 87 Ind. 215.

Upon a recurrence to, and a further examination of, the case of *Hubbard v. Farrell*, *supra*, we feel constrained to admit that the doctrine of that case does not support the conclusion at which we arrived in this case, and that the inconsistency between the two cases is of a character which ought not to be perpetuated by further inadvertence on our part.

As a result of a further examination of both cases, we feel further constrained to hold that the case of *Hubbard v. Farrell*, in question, is not in full accord with the best approved cases on the subject of the revival of debts discharged by proceedings in bankruptcy, and is consequently a case which ought not to be closely followed as a precedent in every point ruled upon it. It recognizes too liberal a rule in the construction of supposed promises relied on for the revival of debts against a discharged bankrupt.

The original opinion in this case has the further support of the recent and well considered case of *Elwell v. Cumner*, 136 Mass. 102, and is, we feel reassured, in harmony with the general current of the authorities bearing upon the same subject.

We are requested by counsel for the appellee, in the event that we still adhere to the opinion that the judgment in this case ought to be reversed, that we will reverse it upon the evidence, and remand the cause for a new trial so as to afford the parties another and better opportunity of contesting the matters in issue between them at the former trial.

The appellee presumably opposed the granting of a new trial in the court below. He is consequently not now in a position which entitles him to insist that the cause ought to be remanded for a new trial. Besides there is nothing in the record which gives assurance that a new trial would probably, and at the same time rightfully, reach a result different from that which we have ordered to be consummated upon the answers to the interrogatories accompanying the general verdict.

The petition for a rehearing is overruled.

Overruled.

NOTE BY THE REPORTER.—See 89 Am. Rep. 692; 86 Am. Rep. 197; 41 Am. Rep. 461; 42 Am. Rep. 59.

A letter by a debtor to his creditor, saying: "I shall pay you all and the

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interest, but you will have to give me time," does not create a new contract not barred by a discharge. *Elwell v. Cumner*, 186 Mass. 102.

A message sent by a bankrupt to his creditor, "tell him I intend to pay him," held sufficient to revive a discharged debt. *Hubbard v. Farrell*, 87 Ind. 215. So of "tell him to come down and I will pay him." *Reith v. Sullman*, 11 Mo. App. 104.

In *Bolton v. King*, 105 Penn. St. 78, it was said: "But the mere acknowledgment of a debt, however clear, distinct and unambiguous it may be in terms, is not now sufficient to restore a debt which has been discharged under the operation of the bankrupt law. *Yoxtheimer v. Keyser*, 11 Penn. St. 364; *Canfield's Appeal*, 1 W. N. C. 67; *Allen v. Ferguson*, 9 Bankr. L. R. 481. The effect of a discharge in bankruptcy is an absolute extinguishment of the debt, and not a mere bar of the remedy for its recovery. Nothing remains after the discharge but the moral obligation to pay, which taken with the fact of the prior legal obligation has been held to form a sufficient consideration for a new express promise; in the nature of the case however there cannot arise a promise by implication, as the mere acknowledgment of a debt would not create any liability, if in fact no debt existed. The promise to restore a debt from which the debtor has been discharged, whether by proceedings in bankruptcy or otherwise, must be a clear, distinct and unequivocal promise to pay the specific debt, not the expression of a mere intention to pay; it must be without qualification or condition, and must contain all the essentials of a valid express agreement, excepting only the element of a valid consideration; the moral obligation, taken with the fact of a pre-existing liability, will furnish the consideration. In an action upon such a claim the declaration must therefore be upon the new promise and not the original, as the latter is extinguished by the discharge.

"The facts principally relied on by the plaintiff below, to establish the fact of a new promise by Henry Bolton to pay the debt, evidenced by the note of July 2, 1872, and to relieve her claim, not only from the bar of the statute but from the defendant's discharge, are contained in a letter written by the defendant to John Shallcross, Esq., who was the plaintiff's attorney in the collection of the note. * * *

"The language of the letter from Shallcross to Bolton was directed to the specific debt in suit, and the acknowledgment and promise contained in Bolton's reply, whatever may have been its precise form, were certainly also made with reference to the same debt. Whether Mr. Rowland or Mr. Shallcross stated correctly the contents of Mr. Bolton's letter, was a question for the jury; the testimony justified a submission; as an acknowledgment of indebtedness and a promise to pay, combined in a single phrase, no form of words could be more distinct, clear and unequivocal than this: 'We owe her the money; will pay it some day; can't say when.' It is true no time was fixed for the payment, but no condition was annexed, no qualification superadded; the word 'will' is auxiliary to 'pay;' the letter was not the expression of mere sentiment, or of a willingness or intention to pay only, it contained a present positive promise, deliberately made by a business man in reply to a business letter, and an action was maintainable upon it as soon as made. If Bolton had

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written, 'We owe her the money, will pay it;' no one could, for a moment, doubt the sufficiency of such an explicit promise, and yet the time of payment is just as indefinite as if the words, 'some day, can't say when' were added. If the promise is otherwise in proper form, it is unimportant that no particular time is designated for payment." The acknowledgment was therefore held sufficient.

In *Bigelow v. Norris*, Massachusetts Supreme Court, January 11, 1886, the defendant, eleven days after his discharge in bankruptcy, wrote to a former creditor, "I will send you the first V or X I have." *Held*, not a valid new promise.

In *Dennan v. Gould*, Supreme Court of Massachusetts, January 11, 1886, the debtor wrote: "My last meeten of Insolvency comes off the last of this mounth, when I intend to receive my discharge. You can say to Mr Allen, after that I will pay his bill. I wish I could given you some money, John, as you ask, but cannot at present. I shall not take any notice of your abuse of me till I have paid you the amount I owe you, *whitch I shall shurly due*, and after that wee will have a nother settlement." "I remain as ever, your friend."

The court said: "The letter of the defendant expresses his intention of procuring his discharge in insolvency, his regret that he has no money to pay him in the future, but it does not contain a distinct promise to waive his discharge, and to pay the debt. The last sentence is not in the words naturally used to import a promise. It expresses an expectation and intention of paying the plaintiff, but does not clearly show that the defendant intended to waive his discharge, or to create a new obligation."

JONES V. DARNALL.

(108 Ind. 509.)

Parent and child — custody of child.

On a proceeding by a father to obtain the custody of his infant from its maternal grandparents, to whom he had intrusted it, the court will not grant the application if it is seen to be against the interests of the child, although there was no gift of the child, and the statute enacts that the father of a minor shall have the custody of it. *

HABEAS corpus. The opinion states the case. The petitioner had judgment below

G. W. Paul, J. E. Humphries, P. S. Kennedy, S. C. Kennedy and W. Reeves, for appellant.

A. D. Thomas and W. J. Darnall, for appellee.

* See notes, 84 Am. Rep. 698; 40 Am. Rep. 827; 48 Am. Rep. 779.

Howk, J. This was a *habeas corpus* proceeding instituted by the appellee, Darnall, to obtain the custody of his infant son, Arthur J. Darnall, from the appellants, Jones and wife, who were the maternal grandparents of such infant. A writ of *habeas corpus* was duly issued, to which the appellants made return in writing, wherein they admitted that they were then in possession of Arthur J. Darnall, the infant son of the appellee and Susanna Belle Darnall, then deceased; but they said that Susanna Belle Darnall died about the 22d day of October, 1884; that appellee's infant son was born on the 28th day of September, 1884; that when Susanna Belle Darnall died, the appellee had no home for his infant son; that before appellee's wife died she requested her mother, one of the appellants, to take and raise such infant child; that appellants were in good circumstances, and were capable of raising such child; that soon after the death of his wife the appellee asked the appellants to take such child and raise it the same as their own child; that they said to him, they were afraid that after they had taken the child and become attached to it, he would want to take it away from them and give them trouble about the child; that the appellee then gave his word to appellants that he would never take the child from them, and upon his promise and agreement with them, they agreed to take and care for such child; that with the full consent of appellee and at the dying request of their daughter, Susanna Darnall, and under the facts stated, the appellants took such child and had taken care of him, and his grandmother had given him the same care and attention she would have given her own child; that such child had to be fed with a spoon, and appellants got up in the night and fed and cared for him; that they had become attached to the child, and felt almost as near to it as they would if it were their own child; that they were willing the appellee might visit his child, and would treat him friendly and would teach the child to love and respect its parents; that appellee gave such child to appellants, and promised he would never take it away from them, and surrendered to them the care and possession of the child; that they had a good home for the child, and were willing and able to care for, support and maintain such child, and would treat him the same as their own child.

Appellants further said, the appellee had no wife and no family, and worked by the month and went from place to place, and had no way to take care of such child; that appellee had no property, and since the death of his wife he had been drunk and at times

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used intoxicating liquor, and had a very violent temper; that the child then had a good and comfortable home with kind and affectionate grand-parents, who were of good habits and were fit and proper persons to have control, care and custody of such child; that it was for the best interests of such child to be left with the appellants; and that the appellee, in his then condition in life, was not a fit and proper person to take charge of such child.

Appellee replied by a general denial to appellants' return, and upon a hearing then had, the court found for the appellee. Over appellants' motion for a new trial, the court rendered judgment awarding the custody of the child to its father, the appellee.

In this court the only error relied upon, in argument, for the reversal of the judgment below, is the overruling of the motion for a new trial. In this motion the only causes assigned for such new trial or hearing were such as question the sufficiency of the evidence to sustain the finding and judgment below.

Appellants' counsel first insist very earnestly that the evidence showed an absolute gift by the appellee of his child to the appellants, which he could not afterward revoke, rescind or annul, so as to entitle him to reclaim the custody and possession of the child from them. It may be fairly said, we think, that there is evidence in the record which tends, at least, to sustain the material facts stated by the appellants in their return to the writ, the substance of which return we have heretofore given. But as to some of these facts the evidence was conflicting; and it was the province of the Circuit Court to settle this conflict, and to determine which of the witnesses were the more worthy of belief. This court will not weigh evidence as a general rule, nor attempt to determine its preponderance. Considering all the evidence in the record, we may say, however, that it fails to show an absolute and unconditional gift by the appellee of his infant child to the appellants, or any intention on his part to yield or surrender to them his rights as a father to the custody and possession of the person of his child for any definite period of time.

In section 2518, R. S. 1881, in force since May 6, 1853, after declaring that the guardian of an infant shall have the custody and tuition of such minor, and the management of such minor's estate, there follows this proviso: "Provided, that the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control

of the education of such minor." On behalf of the appellee, it is claimed in argument that this statutory provision "ought to settle the question in this case," in his favor; and it has seemed to us, after reading the evidence, that the trial court must have taken the same view of this statutory provision as the appellee, in order to arrive at its finding and decision.

In the recent case of *Joab v. Sheets*, 99 Ind. 328, which was a suit by *habeas corpus* between the mother and father of an infant child, about the possession of the person of such child, this court said: "The question of the custody of the child was one in which the rights of the child were primarily involved, and where those of his parents were of secondary consideration merely." So in *Church on Habeas Corpus*, section 442, it is said, in substance, that the modern and "more humane doctrine" has gone far to qualify the old rule, that the father had an absolute right to his children, superior to that of the mother and all others, and that the doctrine is now generally recognized that the interest of the child is the paramount consideration. The case at bar is very similar in its facts to that of *Sturtevant v. State*, 15 Neb. 419; s. c., 48 Am. Rep. 349. In that case, as in this, the controversy was for the custody and possession of a motherless child, of but a few months' age, between the father and maternal grandparents of such child. The statute of Nebraska, in relation to the custody of the person of an infant child, is almost identical with the statutory provisions of this State above quoted; and it was claimed in the case cited, as in this case, that the statute settled the question in favor of the absolute right of the father to the custody of the person of his infant child, as against its maternal grandparents. It was held by the Supreme Court of Nebraska in the case cited, notwithstanding their statute, that if it appeared to be more for the benefit of the infant to remain with its grandparents than to be put under the care of its father, the court should refuse to direct the infant to be delivered to him; and that in such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child.

In *United States v. Green*, 3 Mason, 462, which was a *habeas corpus* proceeding by a father to obtain the custody of his infant child from its maternal grandfather, STORY, J., said: "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of

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any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for maintenance and education. When therefore the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. * * * It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

In Schouler's Domestic Relations, section 248, in declaring the American rule upon the question we are now considering, it is said: "In this country the doctrine is universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents and place the care and custody of them elsewhere. * * * The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. * * * The primary object of the American decisions is then to secure the welfare of the child, and not the special claims of one or the other parent." To the same effect substantially see also the following cases: *Gishwiler v. Dodez*, 4 Ohio St. 615; *Dailey v. Dailey*, Wright, 514; *Cook v. Cook*, 1 Barb. Ch. 639; *Corrie v. Corrie*, 42 Mich. 509.

With this summary of the law applicable thereto, we come now to the consideration of the second ground insisted upon by appellant's counsel for the reversal of the judgment below. It is claimed by counsel that the evidence in the record conclusively shows that the best interests of appellee's child will not be subserved by removing it from the custody of the appellee; and in this view of the evidence we concur with counsel. We have said that as a general rule this court will not weigh the evidence; but an exception to this rule is found in such cases as the one now before us. We have repeatedly held in *habeas corpus* cases, when the case is before us on the evidence, that it is our duty to examine and pass upon its sufficiency to sustain the finding and decision below. *Ex parte Southerlin*, 56 Ind. 595; *Ex parte Walton*, 79 Ind. 600; *Ex parte Kendall*, 100 Ind. 599.

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In the case in hand, after carefully examining and considering all the evidence appearing in the record, we have reached the conclusion that the best interests of appellee's child imperatively require that it should be suffered to remain, during the tender years of infancy, at least, in the custody and care of its grandparents, and that the court should have refused to direct the delivery of such child to its father, the appellee. The evidence does not sustain the finding and decision of the court in appellee's favor, and the court erred, we think, in overruling the appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to enter an order that the child, Arthur J. Darnall, in accordance with this opinion, shall remain with the appellants, and that appellee's petition be dismissed, at his costs.

Petition overruled

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY V. PATTERSON.

(108 Ind. 583.)

Easement — servitude imposed by owner — severance — implied continuance.

A mortgagee of a lot upon which there is a house and appurtenances resting partly upon an adjoining strip of ground owned by the mortgagor, and inclosed by the same fence, but not described in the mortgage, on acquiring title by foreclosure and sale, acquires an easement to the use of so much of such strip of ground as is reasonably necessary.*

ACTION to quiet title. The opinion states the case. The plaintiff had judgment below.

J. S. Tarkington and U. J. Hammond, for appellant.

W. Patterson, for appellee.

MITCHELL, C. J. This suit was brought by Patterson against the insurance company to quiet title to a strip of ground five feet in width in the city of Indianapolis. Shortly stated, the facts found by the court necessary to present the question for decision

* See *Adams v. Marshall* (138 Mass. 228), 52 Am. Rep. 271.

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are as follows: On the 20th day of October, 1876, John Patterson was the owner of a pareel of ground, the proper description of which was, lots two, three, four, and five feet off the north side of lot five, in Brockway's subdivision of out-lots eighty-four and eighty-five, in Blackford's subdivision of out-lot numbered one hundred and fifty-four, in the city of Indianapolis. These several descriptions lay contiguous to each other, forming a body with a frontage of ninety-five feet on California street, extending back one hundred and fourteen feet. The ground was divided by fences into three separate parcels or inclosures, each having upon it a house with neccessary appurtenances, the houses being numbered respectively 293, 297 and 301. Desiring to obtain a loan from the insurance company, Patterson made a written application in which he stated that he would give, as security, a mortgage on "Nos. 293, 297 and 301, on California street, land measuring ninety-five feet on the street, extending back one hundred and fourteen feet; containing — square feet; value \$75 per front foot; buildings, three dwelling-houses built of wood,' etc. An appraisement was made, the appraisers valuing the land at \$60 per foot, amounting to \$5,700, and the improvements at \$5,000. The company's agent examined the property with Patterson, who pointed out to him Nos. 293, 297 and 301, including the yards and appurtenances inclosed with each, and after such examination the agent advised that the loan be made on the security of the property. Patterson thereupon caused an abstract to be prepared and furnished the same to the attorney of the insurance company. On the abstract furnished the property was described as lots two, three and four, in the subdivision above-mentioned. A mortgage was thereupon prepared by the company's attorney, in which the description on the abstract was followed, which omitted any mention of the five feet off the north side of lot five

The mortgage was duly executed by Patterson and wife, and the loan made by the insurance company in the belief that the description in the mortgage covered the ninety-five feet, with the houses and appurtenances as pointed out. Subsequently, the debt falling due, the mortgage was foreclosed, the property sold under the decree and bid in by the insurance company for the full amount of its debt, interest and costs, which amounted to \$5,829.70. The decree and sale followed the description contained in the mortgage, the company all the while supposing that such description embraced

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the ninety-five feet, with the houses as above numbered, and the plats or inclosures with each, as they appeared. Patterson remained in possession until the year for redemption expired, when the company received a sheriff's deed, and went into and still remains in possession of the whole, Patterson becoming tenant of No. 293.

It was found that the house on No. 293 rests upon some part of the north margin of the five-foot strip which was not embraced in the description as written in the mortgage and subsequent proceedings under it, and that some of the appurtenances to the house were also on this strip, and that the whole strip was fenced in with, and formed a part of, the yard and inclosure, but to what extent the house rests on this strip the court was unable to find from the evidence.

About the time the foreclosure proceedings were commenced, Patterson conveyed the five-foot strip to his mother, Nancy Patterson, in payment of a valid antecedent debt, and she afterward conveyed it to the appellee, Clide S. Patterson, who paid nothing for it.

There was no attempt at any time to reform the mortgage, nor is there any claim that it should be reformed. There is no finding that Patterson was guilty of any fraudulent representation or concealment, except as the same may be inferred from the facts above stated.

The question now is as to the respective rights of the parties in the five-foot strip.

On behalf of the insurance company, it is claimed that because part of the house, No. 293, rested on the margin of this strip, and other parts of it were occupied by appurtenances to the house, and the whole of it formed a part of the yard and inclosure at the time the mortgage was made and the proceedings and sale under it were had, the whole strip, or at least an easement in it, passed to the purchaser under the mortgage. Counsel, stating their position, say: "If Patterson owned lot number four, and five feet off of the north side of lot five, and the dwelling and appurtenances upon lot four, and said five feet were all in one inclosure as one yard or parcel, and through, by and under him, appellant has derived title to lot four, and possession of the house, with the inclosed yard, or parcel, and appellee has not shown what, if any, part of said five feet is not occupied by said house and appurtenances (he having the burden), the plaintiff, deriving his subsequent title from said John Patterson, cannot recover because the dwelling-house, well, coal-house, etc., constituted an apparent easement, to which said five feet was in servitude."

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Counsel say further: "It is not sought to reform the mortgage, but to establish by facts and circumstances the location of the property sold at sheriff's sale, that is, finding lot four, you find the five feet inclosed with it, and the dwelling-house upon it and the five feet, and then find that the owner of both parcels conveyed them to different persons at different times, the house with the appurtenances remaining on both. We show by the fact that the five feet were necessary to the support and use of the house, and so were embraced in the mortgage and sheriff's deed to appellant."

On behalf of the appellee, it is contended that as neither the five-foot strip of land nor any interest in any part of it is embraced in the description contained in the mortgage, and the proceedings had under it, nothing passed by implication of law outside the line of the boundaries described.

Presumably, the mortgage contained the usual covenants, but as no mention was made in it of the land here in dispute, or of any right or interest in it, the question is, did any right to or interest in it pass by operation or construction of law?

Upon the subject of easements passing by implied grant, much discussion is found, and while substantial agreement exists as to general rules, considerable uncertainty prevails in their application to particular cases.

As applied to easements in respect of light and air, the subject has been considered and decided by this court. *Stein v. Hauck*, 56 Ind. 65; s. c., 26 Am. Rep. 10. We are not aware that the precise question here involved has received the consideration of the court before. The reasons which control the subject of implied grants, when applied to light and air, are not controlling when such grants are based upon necessity, or the use of actual, visible arrangements and appurtenances annexed to, or adopted by an owner for the apparent and permanent benefit and use of the estate. As a basis for the application of the doctrine, there must have existed a unity of seisin, and a disposition and arrangement of the several parts of one estate with relation to each other, followed by a severance in the ownership. During the unity of title, the owner may subject one of several tenements or adjoining parcels of land to such arrangements, incidents or uses, with respect to the other, as may suit his taste or convenience, without creating an easement in favor of the one as against the other. This is so because the owner cannot have an easement in land of which he has the title. The inferior right

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is merged in the higher title. By the common law it is said to be extinguished by the unity of title. In the civic law it is lost by "confusion." By both, if the easement existed before the unity of seisin, it may revive upon a severance, or if none existed, such arrangements may be adopted while the seisin is united, as that upon a severance an easement will be created by implication of law.

Where during the unity of title an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made. *Lampman v. Milks*, 21 N. Y. 505; *Kieffer v. Imhoff*, 26 Penn. St. 438; *Pennsylvania R. Co. v. Jones*, 50 Penn. St. 417; *Phillips v. Phillips*, 48 Penn. St. 178; *McCarty v. Kitchenman*, 47 Penn. St. 239; Washb. Easements, 56 *et seq.* 619.

The learned author above cited says, page 81, quoting from the note to *Pearson v. Spencer*, 1 Best & Smith, 571: "It may be considered as settled in the United States, that on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general ownership."

So also it was said by Chancellor KENT: "Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. This is the case with the right of way or other easement appurtenant to land. * * * And if a house or store be conveyed, everything passes which belongs to, and is in use for it, as an incident or appurtenance." 4 Kent Com. 467.

In the case of *United States v. Appleton*, 1 Sumner, 492, it was said: "It is observable, that in this case reliance is placed on the language of the grant 'with all the ways,' etc. But this is wholly unnecessary; for whatever are properly incidents and appurtenances.

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of the grant will pass without the word 'appurtenances,' by mere operation of law." *Morgan v. Mason*, 20 Ohio, 401; s. c., 55 Am. Dec. 464; *Morrison v. King*, 62 Ill. 30; *Newman v. Nellis*, 97 N. Y. 285.

The application of the rule must depend upon the nature, arrangement and use of the estate, the relation of the parts to each other, and the existing degree of necessity for giving such construction to the grant as will give effect to what may be supposed to have been, considering the manner of the use, the reasonable intendment of the parties; the underlying principle in such cases being that included in the grant of the principle, are all such privileges and appurtenances as are obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition in which it is enjoyed by the grantor, unless the contrary is provided.

A mere temporary or provisional arrangement however which may have been adopted by the owner for the more convenient enjoyment of the estate, cannot constitute the degree of necessity or permanency which would authorize the engrafting upon a deed, by construction, of a right to the enjoyment of something not within the lines described. To justify such construction, it must appear from the disposition, arrangement and use of the several parts, that it was the owner's purpose in adopting the existing arrangement to create a permanent and common use in the one part for the benefit of the other, or for the mutual benefit of both, and it must be reasonably inferable from the existing disposition and use that it was intended to be continuous, notwithstanding the severance of ownership. *Francies' Appeal*, 96 Penn. St. 200.

Where such arrangement is visible, and apparently designed to be permanent, and is valuable and reasonably necessary to the enjoyment of the parcel granted, and the parties will be presumed to have contracted with reference to the condition of the property at the time of the grant, "and neither has a right by altering arrangements then openly existing to change materially the relative value of their respective parts." *Curtiss v. Ayrault*, 47 N. Y. 73; *Butterworth v. Crawford*, 46 N. Y. 349; s. c., 7 Am. Rep. 352; *Cave v. Crafts*, 53 Cal. 135.

The rule above stated was applied with some degree of liberality in the notable case of *Pyer v. Carter*, 1 H. & N. 916, the authority of which, although denied in the later case of *Suffield v. Brown*, 4 De G., J. & S. 185, is nevertheless in principle generally accepted in this country, with some qualification as to the degree of necessity

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required in order to authorize the inference of a grant or reservation by implication. In the following cases it was held that nothing short of absolute necessity would authorize such inference. *Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 Allen, 366; *Buss v. Dyer*, 125 Mass. 387; *Warren v. Blake*, 54 Me. 266.

It may be inferred that the rule in *Pyer v. Carter*, *supra*, might have been looked upon with more favor by the learned courts in the cases above cited, if as in the case under consideration, it had been sought to apply it to grants of the dominant estate. *Dillman v. Hoffman*, 38 Wis. 559; Washb. Easem. 71. Whether this inference is justified or not, we think the weight of authority in cases like this sustains a rule less exacting than that of strict and indispensable necessity. *Henry v. Koch*, 80 Ky. 391; s. c., 44 Am. Rep. 484; *Cannon v. Boyd*, 73 Penn. St. 179; *Simmons v. Cloonan*, 81 N. Y. 557; *Ingals v. Plamondon*, 75 Ill. 118; *Rogers v. Sinsheimer*, 50 N. Y. 646; *United States v. Appleton*, 1 Summer, 492; *Janes v. Jenkins*, 34 Md. 1; s. c., 6 Am. Rep. 300.

The degree of necessity is to be determined rather by the permanency, apparent purpose, and adaptability of the disposition made by the owner during the unity of title, than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the other. *Dunklee v. Wilton R. Co.*, 24 N. H. 489; *French v. Carhart*, 1 N. Y. 96.

Whether the continuance of the previous use is indispensable to the future enjoyment of the estate granted in the condition it was in when severed, the practicability and effect of new adjustments, and the expense involved in making them, while not conclusive, may properly be taken into account, not for the purpose of determining the necessity of a continuance of the use, but to illustrate the degree of probability that the purchaser, as a reasonable man, took the conveyance with the expectation that the existing use would be continued. The particular facts and the situation and disposition of the estate in each case must control.

The reasonable application of the doctrine, as we deduce it from the authorities however leads to the general conclusion that if the service imposed on one, during the unity of possession of two parcels of land, was of a character looking to permanency, and the discontinuance of such service would obviously involve an actual and substantial rearrangement of that part of the estate in whose favor the service was imposed, to the end that it might be as com-

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fortably enjoyed as before, then such a degree of reasonable necessity would seem to exist as would raise an implication that the use was to be continued.

If on the other hand the arrangement was of an indifferent or probably temporary character, having no apparent adaptability to use for the several parts in the situation in which they are, and the continuance of which, while obviously detrimental to the one, would be of no particular value beyond mere convenience to the other, then no grant would be implied.

Within the foregoing principles, and upon the authority of the adjudications cited, it seems clear that so far as the house on lot four projected over and rested on the strip of ground in dispute, the grant of an easement to continue such use would be implied.

Assuming that both parties knew the exact boundaries, it could not have been within the intendment of either that the house should be moved, or a portion of the wall or overhanging parts shorn off.

It is also found by the court that other appurtenances to the house are located on the five-foot strip. The character of these is not disclosed in the findings. Being appurtenant to the house, presumptively they would pass with it. This presumption however may be rebutted by showing that they were of a temporary character, readily readjusted or replaced, or that their use was not essential to the comfortable enjoyment of the house in the condition it was in when mortgaged. If the strip in dispute was devoted to such use, as that in order to render the house on lot four accessible by the usual and ordinary methods, substantial changes in the structure or in its arrangement would be involved, or its use in the usual and ordinary methods would be impaired unless such changes were made to the extent that it was so used, the use should continue.

As the conclusions thus reached render it necessary to reverse the judgment appealed from, and as we do not deem the question of estoppel involved in the record in its present condition, we give that question no further consideration.

As the judgment of the Superior Court quieted the title of the appellee in the whole strip, notwithstanding the fact found that the house rested in part on the margin of it, it is deemed at least to that extent erroneous, and is accordingly reversed, with costs, and remanded for a new trial.

Petition for a rehearing overruled.

Reversed and remanded.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**GASHWEILER v WABASH, ST. LOUIS AND PACIFIC RAILWAY
COMPANY.**

(88 Mo. 112.)

Carrier — duty on arrival of goods at destination — special contract.

A railroad company accepted goods for transportation, executing a bill of lading conditioned that the goods must be removed from the station on the day of arrival, or stored at the owner's risk or expense, and in case of destruction or damage while in the station, no damage should accrue. *Held* (1), that by the legal rule the company was not bound to notify the consignee of the arrival of the goods; * (2), that the contract absolved him from such duty in any event

ACTION for value of goods shipped. The opinion states the case. The plaintiff had judgment below.

George B. Barnett and George S. Grover, for appellant.

U. S. Hall and J. Montgomery, for respondents.

HENRY, J. This suit was instituted to recover the value of a box and its contents shipped from San Francisco, California, to Moberly,

* To same effect, *Merch. Disp. & Trans. Co. v. Moore* (88 Ill. 186), 80 Am. Rep. 541, and note, 543.

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Missouri. The petition contained two counts. The first charged defendant with a breach of duty, as a common carrier, in failing to notify plaintiff, or her agent, of the arrival of said box at Moberly, in failing to transport said box from St. Joseph, Missouri, to Moberly, and deliver the same, and its subsequent destruction by fire, at defendant's freight depot at Moberly.

The second count charged defendant with a breach of its duty, as a warehouseman, alleging that said box, after it reached Moberly, was stored by defendant in an unsafe, insufficient and highly inflammable building, to which fire was communicated by sparks and coals of fire which was negligently allowed to escape from an engine belonging to and operated by defendant.

The answer of defendant admitted that it was a common carrier, and received said box at St. Joseph from the Central Pacific railroad, to be transported to Moberly; denied the other allegations of the petition, and specially pleaded the release and bill of lading as hereinafter set forth, and that after safely transporting the box to Moberly, on the 1st day of April, 1881, in consequence of plaintiff's failure to call for and receive it, the box was placed in a safe, secure and suitable warehouse, where, without defendant's fault, it was on the 6th of April, 1881, destroyed by fire.

The following is appellant's statement, which respondent's counsel concedes to be fair in all particulars except in the description of the depot building where the cases of goods were stored after they reached Moberly:

On the 7th day of March, 1881, the plaintiff shipped one case of household goods from San Francisco, California, to Moberly, Missouri, prepaying the freight thereof (\$13.50) for the entire distance. The contract of shipment was made with the Central Pacific Railroad Company. At the time of making such shipment plaintiff executed a release, wherein it was stated that in consideration of the transportation of said case of household goods at the usual and customary rates charged for goods of the same class, when the carriers are released from their extraordinary liability as such, the same being less than the current rates for the same class of freight shipped under the carrier's legal responsibility, said railroad company and its connecting lines were released from all liability to plaintiff, or to the owner of the property, for loss or injury to said goods while in transit, except such as might result from the negligence of the carrier. At the same time the Central Pacific Rail-

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road Company executed and delivered to plaintiff a through bill of lading for the entire transportation of said case; which bill of lading contained, among others, the following conditions:

1. That the goods must be removed from the station during business hours on the day of their arrival, or be stored, at the owner's risk and expense, and in the event of their destruction or damage, from any cause, while in the depot, no damages should accrue therefor.

2. That the carriers should not be responsible for loss or damage to goods from fire, from any cause whatever, while in transit or at stations.

The case of goods was transported by the Central Pacific railroad and its connecting lines to Kansas City, Missouri, and was there delivered to the defendant. It left Kansas City on the railroad of defendant on the 30th of March, 1881, and arrived at its destination, Moberly, Missouri, on the next day, March 31, 1881. The owner was not there to receive it, consequently it was unloaded from the car on the day following, April 1, and was stored in defendant's freight depot, where it remained uncalled for until April 6, 1881, when the building and contents, including the case in question, were wholly destroyed by fire. Defendant's freight depot at Moberly was a wooden building, similar to other buildings of its class on all railroads. The roof was of shingles which were getting old, and were somewhat curled up at the ends. Oil had been stored in the building from time to time, in the usual course of business, and some of it had been spilled upon and saturated portions of the floor planks.

The building had been rebuilt in 1869, resingled, painted and put in thorough repair. It was in good condition at the time of the fire; was secure as to the weather or thieves, had good strong doors which were securely locked at night, and was carefully watched and tended by careful, prudent and competent men in defendant's employ. At the time of this fire the locomotive engines of defendant were all in good order, manned and operated by careful, competent and experienced engineers, and supplied with all the best known, approved and modern appliances for the prevention of the escape of sparks and fire, and on said day such appliances were in perfect working order and were carefully handled and inspected by competent men employed by defendant for that purpose. The Missouri, Kansas & Texas railroad, a railway line then operated

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separately and under an independent management, crossed defendant's tracks near the freight depot in question, and one of the engines of that company, then in bad order, threw sparks upon the building while passing it, which set it on fire and burned it down.

There was no conflict in the testimony, either as to the contract of shipment, which fact was admitted by plaintiff, the age and condition of the freight depot or warehouse, the condition of defendant's engines, their structure and careful inspection, nor that the building was burned by sparks falling on it from a defective M., K. & T. engine, then passing by it on the track of that company. There was a conflict in the testimony as to whether any notice was given of the arrival of the goods, Mr. Barrowman, defendant's freight agent at Moberly, testifying that he notified Mr. Lowell, plaintiff's cousin and agent at Moberly, on the 2d or 3d and again on the 6th of April, of such arrival, while Mr. Lowell testified that no such notice was given him by Mr. Barrowman until the day of the fire, and just before it occurred. The market value of the articles lost was proven to be the sum of \$296.55. The court admitted all evidence showing or tending to show the age, quality and kind of material, its proximity to railroad tracks, and condition of defendant's freight depot at the time of the fire, and to this ruling defendant excepted.

The following instructions were given in this case:

1. The jury are instructed that when the plaintiff did not, for any cause, demand and receive her goods after their arrival at Moberly, it then became and was the duty of defendant to store them in a reasonably safe warehouse, under the charge of competent and careful servants, ready to deliver them when called for; and in the selection of said warehouse, and the care and custody of said goods, the defendant was bound to use ordinary care and diligence, such as a prudent man would exercise in the care and control of his own property of a like nature, under similar circumstances, and such care should be in proportion to the injury or loss likely to be sustained by any omission of such care on his part. And if the jury believe that the defendant did not so store, care for and protect said property, and that by reason of its want of such care and diligence plaintiff's goods were destroyed, your finding must be for the plaintiff upon the second count in plaintiff's petition.

The court of its own motion gave the following:

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“It was not the duty of defendant to notify plaintiff or her agent of the arrival of the goods, and if * * * defendant exercised ordinary care and diligence in placing the goods in a warehouse or depot that was reasonably safe from fire, they will find for defendant; and if they did believe that defendant did not exercise such diligence and care * * * and in consequence of such negligence the goods were lost, they will find for plaintiff on the second count.”

The jury found a general verdict for plaintiff on which the court rendered a judgment, from which defendant has appealed. The first count and all questions relating to it are out of the case, the court having instructed the jury to find for defendant on that count; and this also answers and disposes of all objections to the verdict as being general.

It has been a vexed question when the liability of a railroad company as a common carrier of goods ceases, after the arrival of the goods at their destination; but the weight of authority is, that on the arrival of the goods at their destination, after they have been discharged from the cars, the liability of a railroad company as a common carrier ceases, and it becomes a bailee for hire. *Norway Plains Co. v. R. Co.*, 1 Gray, 265; *Rothschild v. R. Co.*, 69 Ill. 164; *M. D. T. Co. v. Hallock*, 64 Ill. 284; *McCarty v. R. Co.*, 30 Penn. 247; *Shenk v. Propeller Co.*, 60 Penn. St. 109; *Mohr & Smith v. R. Co.*, 40 Iowa, 580; *R. Co. v. Kidd*, 35 Ala. 209; *Jackson v. R. Co.*, 28 Cal. 268.

The contrary has been held by the courts of last resort of New Hampshire, Wisconsin, Kentucky, New Jersey, Louisiana, Ohio and Kansas; but as early as 1858, the Supreme Court of this State, in *Holtzclaw v. Duff*, 27 Mo. 395, held that: “After the hemp (shipped over the H. & St. J. R. R.) reached the terminus of the road, and was removed from the cars, a different and less onerous obligation was assumed, and they became liable as warehousemen and forwarding agents, and as such were only bound to take reasonable care of the property, and were only answerable for losses occasioned by their fault or neglect.” The same doctrine was reiterated by this court in *Cramer v. Exp. Co.*, 56 Mo. 528. See also Ang. Carr. (2d ed.), §§ 302, 304. We must regard the law as so settled in this State. Nor is it necessary, in order that this change in the liability of the railroad company from that of a common carrier to that of a warehouseman may be affected that notice of the arrival

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of the goods at their destination should be given by the carrier to the consignee.

There is also a conflict of authority on this question, but in *Rankin v. Pac. R. Co.*, 55 Mo. 168, it was held that: "The rule in respect to notifying consignees of the arrival of goods does not apply to railroads, where the goods are delivered on time. They are not required, as carriers by wagons, to deliver at the place of business or house of the consignee, nor as carriers by water, to notify the consignee of the arrival at the wharf. Their route is confined to a track, and the delivery must be at a depot or by the roadside, and if there be no one to receive them, they may store them without charge for a reasonable time, till the consignee calls for them. It is the duty of the consignee to do so without notice, as the usual certainty of the arrival of the train renders such notice unnecessary."

A warehouseman or other bailee for hire is only answerable for a loss occasioned by the want of ordinary care and skill. Ang. Carr., § 415; Story Bailm. (9th ed.), § 444. But a warehouseman may contract for a more restricted liability than that which the law imposes upon him. He may, by agreement, restrict his liability, except as to a loss occurring through fraud, or want of good faith. Ang. Carr. (5th ed.), § 59; *Alexander v. Greene*, 3 Hill 9; *Wells v. Steam Nav. Co.*, 2 N. Y. 208; Story Bailm. (9th ed.), § 79.

But conceding for the sake of the argument, that the correct doctrine is that announced in the leading New Hampshire case, which has been adopted in some of the States, that the common carrier's liability as such continues until the delivery of the goods to the consignee, or until after notice of their arrival, he has had a reasonable time within which to remove them; yet the manner of delivering the goods, and the period at which, after their arrival at their destination, the responsibility of the common carrier will cease, may depend upon a special contract between the parties, or a local custom. Story Bailm. (9th ed.), § 543; 1 Rawle, 203; 15 Johns. 39; 17 Wend. 305; 1 Metc. (Ky.) 558; 18 Mich. 131. *Buckley v. Railway Co.*, 18 Mich. 131, it was held that in the absence of any usage, special circumstances, or agreement, the liability of railroad companies for goods in warehouse awaiting delivery is that of a common carrier, and it was said by the court that: "The course to be pursued by the carrier, to shield himself from further responsibility, in his quality of carrier, when the transportation is accomplished, is not the subject of abstract law disconnected from the surrounding

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circumstances, but is a matter depending upon contract, and to be determined by reference to the express stipulations of the parties, or the varying facts from which, when presented, the law will infer the rights, duties and obligations of the parties."

In the case of *Huston v. Peters*, 1 Metc. (Ky.) 561, the court said: "But may not the manner of delivering the goods, and consequently, the period at which the responsibility of the carrier will cease, in some measure at least depend upon and be governed by the custom of particular places, and the usage of particular trades, or upon a special contract between the parties?" Again: "*Prima facie* there must be actual delivery, or in the case of a carrier by water, a landing at the wharf or usual landing place, with due and reasonable notice to the consignee of the arrival of the goods. But the rule may be varied by contract, or affected by a well established, reasonable and generally known custom and usage."

The bill of lading given in this case was not only a contract relating to the transportation of the goods from the point of shipment to their destination, but also a contract prescribing the duties of the consignor and the carrier, after the goods reached their final destination. Under that contract defendant was liable as a warehouseman only for a loss occasioned by its gross negligence or bad faith. The instructions given by the court declared the defendant's duty and liability as a warehouseman as if there had been no written agreement restricting its liability. Again the count upon which plaintiff was permitted to recover declared against defendant as a warehouseman, and the court recognizing that defendant was such, virtually denied to it the right to limit its liability, a right beyond question, if it was a warehouseman, and under that count it could not be held liable as a common carrier, but only as a warehouseman.

The judgment is reversed and the cause remanded, and before a retrial it would be well for plaintiff to amend her petition, wherein it alleges that the warehouse was set on fire by sparks escaping from defendant's engine.

Reversed and remanded.

All concur except NORTON, J., dissenting.

State v. Gregory.

STATE V. GREGORY.

(88 Mo. 128.)

Physicians — State board of health — mandamus.

Under a statute regulating the practice of medicine and surgery, an applicant for leave to practice who has a diploma must furnish the State board of health satisfactory proof that it was granted by some legally chartered institution in good standing. *Held*, that the granting of leave by the board is discretionary, and will not be enforced by *mandamus*.

MANDAMUS. The opinion states the case. The writ was denied below.

Bryant, Holmes & Waddell, for relator.

D. H. McIntyre, attorney-general, for respondent.

SHERWOOD, J. This is an original proceeding in this court, having for its object our peremptory writ commanding respondents to issue and deliver to the relator a certificate, as provided for in the act of April 2, 1883, authorizing him to practice medicine in this State.

The issuance of the alternative writ has been waived, the petition therefor by agreement standing in lieu thereof.

[Omitting petition.]

The provisions of the act approved April 2, 1883, entitled "An act to regulate the practice of medicine and surgery in the State of Missouri," so far as necessary for quotation, are these:

"SECTION 1. Every person practicing medicine and surgery, in any of their departments, shall possess the qualifications required by this act. If a graduate of medicine, he shall present his diploma to the State board of health for verification as to its genuineness. If the diploma is found to be genuine, and if the person named therein be the person claiming and presenting the same, the State board of health shall issue its certificate to that effect, signed by at least four members thereof, and such diploma and certificate shall be deemed conclusive as to the right of the lawful holder of the same to practice medicine in this State. If not a graduate, the person practicing medicine in this State shall present himself before said board and submit himself to such examination as the said board

shall require, and if the examination be satisfactory to the examiners, the said board shall issue its certificate in accordance with the facts, and the lawful holder of such certificate shall be entitled to all the rights and privileges herein mentioned.

“SEC. 2. The State board of health shall issue certificates to all who shall furnish satisfactory proof of having received diplomas or licenses from legally chartered institutions in good standing of whatever school or system of medicine; they shall prepare two forms of certificates, one for persons in possession of diplomas or licenses, the other for candidates examined by the board; they shall furnish to the county clerks of the several counties a list of all persons receiving certificates; provided that nothing in this act shall authorize the board of health to make any discrimination against the holders of genuine licenses or diplomas under any school or system of medicine.

“SEC. 3. Said State board of health shall examine diplomas as to their genuineness, and if the diplomas shall be found genuine as represented, the secretary of the State board of health shall receive a fee of one dollar from each graduate or licentiate, and no further charge shall be made to such applicant; but if it be found to be fraudulent, or not lawfully owned by the possessor, the board shall be entitled to charge and collect twenty dollars of the applicant presenting such diploma. The verification of the diploma shall consist in the affidavit of the holder and applicant, that he is the lawful possessor of the same, and that he is the person therein named; such affidavit may be taken before any person authorized to administer oaths, and the same shall be attested under the hand and official seal of such officer, if he have a seal. Graduates may present their diplomas and affidavits as provided in this act, by letter or proxy, and the State board of health shall issue a certificate as though the owner of the diploma was present.

“SEC. 4. All examinations of persons not graduates or licentiates shall be made directly by the board, and the certificates given by the board shall authorize the possessor to practice medicine and surgery in the State of Missouri.”

[Omitting other considerations.]

The second point made by the demurrants will now be discussed in connection with the statute on which it is bottomed. What is the purpose of that statute? Its central and dominant idea? By what instrumentalities and what methods was that purpose to be

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effectuated, and that idea clothed with the garments of practical performance? An answer to these questions solves the sufficiency of the petition on the point now being considered. An attentive reading of the statutory provisions already quoted, together with others in *pari materia*, cannot fail to discover that the legislature, so far as legislation could be made effectual, was determined to provide for the sanitary welfare of the people of this State, and to rid this Commonwealth of that class of medical pretenders known by the various designations of empirics, mountebanks, charlatans and quacks. To this end, but three days prior to the approval of the act in question, one had been approved creating a "State board of health," on which was conferred a "general supervision over the health and the sanitary interests of the citizens of the State," and made their duty to recommend to the general assembly sanitary laws, and to city and county courts the adoption of any rules they may deem wise or expedient for the protection and preservation of the health of the citizens thereof, and they were also empowered to administer oaths and "to take testimony in all matters relating to their duties and powers." Acts 1883, pp. 95-97, §§ 3 and 16. To this end also it was enacted that when any one desired to practice the medical profession in this State, he should do one of two things: either to present himself before the State board of health and "submit to such examination as the said board shall require," or if a graduate of medicine, to present his diploma to the State board of health "for verification as to its genuineness," and "if the diploma is found to be genuine and the person named therein to be the person claiming and presenting the same, the State board of health shall issue its certificate to that effect," etc. Acts 1883, p. 115, § 1.

An ingenious argument has been made in behalf of the relator endeavoring to show that his right to a certificate is exclusively bottomed on section 1, just quoted; that this right became a consummate when the diploma was verified as to the genuineness and the person named in it found to be the person claiming and presenting the same, and that this court in ascertaining whether relator is entitled to the exercise of our mandatory authority in his behalf, must center and confine our attention to that section alone. Should we do this, our action would certainly be at variance with that very familiar rule of ascertaining the legislative intent, which requires that, save in exceptional instances, instances where the legislative

object is accomplished, embraced and ended in and by a single section, that the whole statute, and sometimes others in *pari materia*, must be looked to in the effort to discover the entire legislative meaning. Potter's Dwar., pp. 144, 145, §§ 12, 17, 19; Sedg. Const. Stat. 325. This case is not an exceptional one; the legislative thought and purpose are not fully expressed, nor the legislative methods whereby that purpose is to be executed, fully described in section 1. This will become apparent as we proceed further in this discussion; thus while section 1 provides for the issuance of certificates to graduates and examinees, it remains for section 2 to declare that the board shall "prepare two forms of certificates, one for persons in possession of diplomas, the other for candidates examined by the board." As the legislature has only made provision in that section for but two forms of certificates, neither of which embraces the case of a graduate who has been so unfortunate as to lose his diploma, it must needs follow that the legislature has made no provision for a case of that character. This being true, it will also follow that those words in that section requiring the board "to issue certificates to all who shall furnish satisfactory proof of having received diplomas from legally chartered medical institutions in good standing," are to be applied, and can only be applied to that class of persons for whom the board is to prepare one of those forms of certificates and none other, i. e., to that class of "persons in possession of diplomas."

As a necessary sequence of the foregoing it must devolve on him who is possessed of a diploma to furnish to the board "satisfactory proof of having received" such diploma "from a legally chartered medical institution in good standing," and this too in addition to the requisites as to verification, particularly specified in section three.

And if leaving the plain language and letter in section two, we should look to the reasons which gave to the statutory provisions their birth and their being; look to the mischief they were designed to extirpate and the remedy and protection they were designed to furnish, it would seem passing strange that any other conclusion than that announced should be reached. For why should the legislature create a board of health with such comprehensive powers, and then in one case, where profert is simply made of the diploma and the affidavit, require that the board should look no further, but straightway go through the perfunctory performance of issuing a certificate to the appellant, and yet when the diploma is merely

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lost, proof satisfactory must be made that the absent diploma is issued by "a legally chartered medical institution in good standing?" Is it not obvious, under the claim made by the relator that the possessor of the diploma, *ipso facto*, becomes the possessor of a certificate; if so, wherein consists the protection which the board of health affords in that class of cases? Does not such a construction for the most part nullify the statute and abolish the board of health? If satisfactory proof that a diploma has emanated from a medical institution in "good standing" is requisite in the one case why not in the other? Surely no satisfactory answer, no answer based upon the reason and spirit of the law can be returned to these questions, save one which coincides with the views already announced.

For these reasons the second ground of demurrer must be held valid and the petition fatally defective in lacking the allegations which the demurrer points out.

There is another matter, which though not raised by the demurrer is obviously presented by the petition when considered in connection with the section just discussed and the nature of the relief sought. And we examine this matter the more readily because requested by both parties to this controversy, that the "whole law of the case be settled in the outset." The point we refer to is this: If the proper view has been taken of the meaning of section two aforesaid, then the board of health, in the discharge of duties in reference to the issuance of certificates, is engaged in the performance of those things which essentially partake of a judicial nature, requiring the examination of evidence and passing on its probative force and effect, requiring the exercise of judgment and the employment of discretion. Now while courts on suitable occasions will apply the spur of *mandamus* to put the discretion of inferior courts and officers in motion, yet after that discretion has been exercised, as in the case at bar, no matter in what way, the mandatory authority to compel the doing of the particular act prayed for is at an end. Of course these remarks have no relevancy to acts simply ministerial, where no judgment is to be exercised; but this case is not regarded as of that character, and whenever an element, shred or degree of discretion enters into the duty to be performed, the functions of mandatory authority are shorn of their customary potency and become powerless to dictate terms to that discretion. Were the rule otherwise, instead of officers discharging their duties

in accordance with their own official discretion, that of a court would be substituted therefor, and in instances like the present, should this court, proceeding contrary to all precedent, arrogate to itself such revisory powers, it would, while palpably usurping functions conferred exclusively by the law upon others, in the endeavor to ascertain whether a given college is a "medical institution in good standing," might find itself seriously embarrassed by the character of the investigation it would be compelled to make; might find itself wandering amid the mazes of therapeutics or else boggling at the mysteries of the pharmacopoeia, etc. To state such an outcome is necessarily to condemn the process of reasoning by which it is reached.

Abundant authority, it need scarcely be said, sustains the position that discretionary powers are not revisable, and that this rule applies with especial force to cases where mandatory aid is sought. High Extr. Leg. Rem., §§ 24, 43, 44, 44a, 45, 46, 47, 57, 58, 230 and cases cited; Ang. and Ames Corp., §§ 713, 714 and cases cited; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Brennan*, 39 Barb. 651; *People v. Supervisors*, 12 Johns. 414; *Chase v. Canal Co.*, 10 Pick. 244; *Hargreaves v. Taylor*, 3 B. and S. 611.

In a recent case in Minnesota, *State v. State Medical Examining Board*, 32 Minn. 324; s. c., 50 Am. Rep. 575, the same view is taken of the point and *mandamus* refused, where the board of health of that State, acting under a statute similar to our own, had refused to grant a certificate to one who had been guilty of "unprofessional or dishonorable conduct." And in that case it is also decided, and a number of authorities are cited in support of the ruling, that the creation of such a board with powers such as have been described, is within the power of the legislature and does not transcend constitutional limits. It is thought best to say this in conclusion, that notwithstanding what has been said relative to the discretionary powers of the board of health, that according to the express terms of the proviso in section 2, *supra*, such discretionary power does not extend to discriminating against any particular school or system of medicine, and that should such discrimination ever occur, the limits of discretionary power will have been passed. Relator, if he desires, has leave to plead further.

All concur, except HUGH, C. J., who concurs in all the paragraphs of this opinion, except the last one, which he does not regard as pertinent to the present state of the pleadings.

Harrison v. Smith.

HARRISON V. SMITH.

(83 Mo. 210.)

Bank—whether depositary or trustee.

A bank in Missouri undertook to lend money on real estate there for plaintiff who resided in New York. The plaintiff sent the bank a check on a New York bank, the sum to be lent, payable to it, to be paid to the borrower when the terms of the loan as to delivery of securities were performed. The bank credited the check to plaintiff on investment account and sent it to its correspondent in New York by whom it was collected and credited to the sender. Meantime the bank led plaintiff to believe that the loan had been perfected, and subsequently made an assignment for benefit of its creditors. *Held*, (1) that the relation was that of trustee and *cestui que trust*, and not that of depositor and depositary; (2) that the bank was liable for wrongfully mixing the proceeds of the draft with its own money.

ACTION to declare a lien on assets in the hands of an assignee. The opinion states the case. The plaintiff had judgment below.

W. H. Watts and Henry Smith, for appellant.

Gage, Ladd & Small, for respondent.

NORTON, J. The Missouri Valley Bank was a banking corporation doing business in Kansas City, and on the 17th day of February, 1881, it made a general assignment of its assets to defendant Smith for the benefit of creditors; and this suit was instituted against him for the purpose of impressing the assets in his hands with a trust, and as a foundation for the claim, it is averred substantially in the petition that the Missouri Valley Bank was acting as the agent of plaintiff, who lived in the State of New York, in effecting loans of plaintiff's money on real estate security; that plaintiff, on being advised by the bank that it could effect a loan of \$4,500 to Lycurgus and Elizabeth Raitsback, secured by deed of trust, sent to the bank in the last of December, 1880, or first of January, 1881, the sum of \$4,500, not as a deposit, but as a special trust for effecting said loan, and which was to be held by said bank only for delivery to the said Raitsbacks when they executed and delivered a note for the same, secured by a recorded deed of trust; that said sum of money, instead of being applied by the bank, as directed and agreed by and between the bank and plaintiff, was wrongfully mingled with the cash and

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other assets of the bank which came to the hands of defendant Smith under the assignment. The prayer of the petitioner is that said sum may be decreed to be a lien on said assets, that it be paid out of said assets before the same or any part thereof is used for the benefit of the general creditors.

The defendant set up in his answer substantially that plaintiff was simply a depositor of the bank and that the relation between the plaintiff and the bank was simply and only that of debtor and creditor; it also denied that the bank contracted with the plaintiff as alleged in the petition; denied that the money claimed by him, or any part thereof, was wrongfully mingled with the cash and other assets of the bank, and as such came to the hands of defendant. It is then averred that when the money for which the suit is prosecuted was paid into said bank the same was not kept in a package separate and distinct from other funds, but that the same was mingled with its other money and effects, and was again, and long prior to said assignment, along with other money and effects, paid out by said bank in the usual course of its business, and that no part of said money or its proceeds remained in said bank or formed part of its assets or ever came to defendant's hands. In the trial of the issues involved, the trial court found in favor of plaintiff the sum of \$3,150, and decreed its payment by defendant in conformity with the prayer of the petition, and from this judgment and decree the defendant has appealed.

The first question arising on the appeal is: Was the relation between plaintiff and the Missouri Valley Bank, as to the money sued for, that of principal and agent, trustee and *cestui que trust*, or simply that of depositor and depositary? The trial court found this relation to be that of trustee and *cestui que trust*, and this finding, we think, is abundantly sustained by the evidence. As the evidence upon this subject is epistolary and embraced in a lengthy correspondence, we omit it in consequence of its voluminousness, contenting ourselves with stating its substance. It appears from it that the plaintiff was a resident of Troy in the State of New York, and that the bank, in the latter part of the year 1879, through its cashier, wrote him a letter stating that loans of money could be effected in Kansas City on real estate security treble the value of the amount loaned; proposing to act for and on behalf of plaintiff in effecting such loans; that when loans were applied for the bank would write to plaintiff, naming the amount required, with descrip-

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tion and value of property proposed to be given as security, and the plaintiff would send the amount required in a check payable to the Missouri Valley Bank to be handed over to the borrower when the terms of the loan, as to execution and delivery of note and deed of trust to secure the same, were completed. It appears that in the latter part of the year 1880 plaintiff was informed by letter from the bank that Mrs. Raitsback and her husband were desiring to borrow \$4,500 on five years' time, at eight per cent interest, and that if he would propose to make the loan the bank would secure it for him; that the loan was a choice one, on the best residence property, and to responsible parties. The correspondence on the subject of this loan culminated in plaintiff sending his check for the required amount on parties in New York to be loaned to the Raitsbacks on the terms proposed. The correspondence in reference to this loan continued till the 11th of February, 1881, six days before the bank broke and made an assignment to defendant Smith. We cannot see how, on this evidence, the court could have found otherwise than it did, viz.: that as to the money the relation of plaintiff and the bank was that of trustee and *cestui que trust*. The fact that the bank credited the amount received to plaintiff (on investment account) could not, and did not, change this relationship and create simply that of debtor and creditor. Mr. Harrison, the plaintiff, as the evidence shows, resided in the distant State of New York and kept his accounts as depositor in his home banks, and there is no evidence in the case tending to show that it was his intention to withdraw such deposits and place them as a depositor in the Missouri Valley Bank at Kansas City.

The next question arising on the appeal is: Did the bank wrongfully mingle and intermix the proceeds of this draft with its own money and assets? The trial court found that it did, and this finding is also we think, fully sustained by the evidence, which shows that the bank, instead of being a faithful agent and true to the trust confided to it in perfecting the Raitsback loan, sent the same to its correspondent, the Continental Bank of New York, for collection and credit, by which it was collected and credited, in the meantime leading plaintiff to believe by its correspondence, continued down to a period of time only six days before the assignment, that the loan had been perfected.

The only remaining question is: Whether under the above state of facts, plaintiff has an equitable right to have his demand first

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paid out of the assets in defendant's hands, and before the same are paid out to the general creditors of the bank? It is insisted on the part of appellant that plaintiff has no such right, because it was not shown by the evidence into which particular asset of the bank the fund went; that the money could not be followed because it had no "ear-mark," and that the proceeds of the draft were so intermingled with other assets as not to be distinguishable; that the trust money had all been paid out by the bank before the assignment in its usual course of business. In support of the last proposition it is claimed that the conclusion therein stated "that the trust money had all been paid out by the bank," had been arrived at by the application of the rule laid down in 1 Perry Trusts, § 463, where it is said: "The rule to be applied in such cases is stated in *Pennell v. Deffell*, as follows: 'The checks are to be applied to the earliest items of deposit, whether of the trust fund or the trustee's own money, and such earlier items will be reduced *pro tanto*.'"

It is a sufficient disposition of this authority to say that in the recent case of *Knatchbull v. Hallett*, 13 Chan. Div. 696, decided in 1879, the rule laid down in *Pennell v. Deffell* was condemned and held not to be applicable in a case like the one before us. In the case above referred to the right of *cestui que trust* to follow the trust fund when it has been mingled with the private funds of the trustee is elaborately discussed, and the doctrine distinctly announced that when the trustee mixes the trust money with his own, so that it could not be distinguished what particular part is trust money and what part is private money, equity will follow the money by taking out the amount due the *cestui que trust*, and the doctrine that you cannot follow trust money mixed with other money in an undistinguishable mass, because of its having no "ear-mark," must be taken as subject to the application of the above rule. The same subject has been recently discussed in an exhaustive and elaborate opinion of the Supreme Court of the United States in the case of *National Bank v. Insurance Co.*, 104 U. S. 54, decided in 1881, where it is held that as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust, and if a man mixes trust funds with his own money the whole will be treated as trust property, except so far as he may be able to distinguish what is his.

So this court in *Pomeroy v. Benton*, 57 Mo. 531, approvingly

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quoted from 1 Story Eq., § 468, the following: "An agent is bound to keep the property of the principal separate from his own: if he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him, and so far as he is unable to do this, it is treated as the property of his principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of the principal." See also *Jewett v. Dringer*, 30 N. J. Eq. 291. We have been cited by counsel for appellant to a number of authorities maintaining the doctrine that trust money intermingled with other money cannot be followed by the *cestui que trust*, because money has no ear-mark, and among others is the case of *Mills v. Post*, 76 Mo. 426, to which we are unwilling further to adhere, in so far as it recognizes the principle that trust money mixed with other money cannot be followed because it cannot be distinguished by reason of its having no ear-mark, believing the rule announced in the cases above cited by us to be more in consonance with sound reason and more productive of just results.

If A., holding \$1,000 in coin in trust for B., place it in a bag or box and mingle with it \$1,000 in coin of his own, whereby the particular \$1,000 of coin of trust money cannot be distinguished from the \$1,000 of private money, it is, we think, more consonant with equity for the chancellor to say he will put his hand in the bag and take from it and restore to B. his \$1,000 of trust money, than for him to say because of the fact that the money is not ear-marked and the fact that because of A.'s wrongful act in thus mixing the funds one cannot be distinguished from the other, that B. can take nothing in virtue of the trust, but must take his chances with the general creditors of A. Applying this principle to the case before us, where the trust money of plaintiff was mingled wrongfully, if not fraudulently, with funds of the bank and went into its business operations a very short time previous to the assignment of its effects, and while not clearly traceable to any particular asset

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of the bank, the fact remains that it went into its assets and to the extent of \$4,500 increased and swelled the volume of its assets, and it logically follows from such application of the principle that plaintiff was entitled to the relief prayed for and that the judgment of the court granting it ought to be affirmed, which is accordingly done with the concurrence of the other judges.

MERRILL v. CITY OF ST. LOUIS.

(88 Mo. 244.)

Marriage — nuisance on land of wife — her liability.

A married woman who has real estate separately settled on her, the legal title being in her husband as trustee, is liable for an injury received by one by falling through a coal hole in the sidewalk, suffered to be out of repair.

ACTION for personal injuries by negligence. The opinion states the facts. The plaintiff had judgment below.

Leverett Bell, for appellants.

Chas. T. Noland, for respondents.

PHILLIPS, C. This is an action to recover damages for injuries sustained by the plaintiff, Hannah M. Merrill, from falling through a coal hole in the sidewalk on one of the streets of St. Louis city. The action was brought in the name of said Hannah alone, as if she were a *feme sole*. The petition alleged that the legal title to the real estate adjoining the sidewalk, where the injury occurred, was in James M. Duffer, who held the same in trust to the sole use of his wife, Lucinda M. Duffer, who were made co-defendants with the city of St. Louis. It was further alleged that said premises were used by said Duffer and wife, and the hole or opening in the sidewalk was used by them in conveying coal to the cellar under the house; that said coal hole was defective, etc., whereby Mrs. Merrill fell into the same and was greatly injured. The answer tendered the general issue.

[Minor questions omitted.]

The more important question involved in this appeal is the action

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of the Circuit Court in rendering judgment *in personam* against Mrs. Duffer, a married woman. The Court of Appeals, in an able opinion, sustained the validity of the judgment. It is placed chiefly on the ground that Mrs. Duffer was the separate owner of the real estate, for the betterment of which the nuisance was maintained; that the neglect to keep the coal hole in repair was a tort; and a married woman, at common law, is answerable personally in damages for her torts not committed in the presence or under the influence of her husband. The learned counsel for appellants does not controvert this general proposition. But his contention is, if we rightly comprehend his argument, that the Court of Appeals lost sight of the fact, or at least failed to meet it, that the legal title to the real estate was in the husband, who was managing the property and collecting the rents for her; and that in fact she neither created the nuisance, nor controlled the property on which it was permitted.

The title deed to this property does not appear in the record. The statement is, that the legal title was vested in the husband for the separate use of the wife. The property was acquired by Duffer about twenty-five years prior to the injury in question. There were no improvements on the lot when bought, and the husband testified that he had the house built and the improvements made thereon. He seems to have attended to renting and collecting rents thereon at times; at other times other persons attended to these matters, but whether under direction of the wife or husband does not appear. As a matter of course, in the absence of any thing to the contrary appearing, we are bound to assume that all these things were done for the use and benefit of the beneficial owner of the property. She was the real party in interest. The husband was the mere depositary of the legal title. His was a dry, naked trust, not coupled with any interest. There is nothing in the record to show that he had acquired even an inchoate interest of curtesy. He is therefore to be regarded, in this discussion, as any other stranger who might be such trustee, with no greater or less obligations and responsibilities resting on him. 1 Bish. Mar. Wom., § 803.

Without discussing the duties of such a trustee toward the property thus held by him, to protect it against waste and trespasses, by lending his name to maintain the necessary actions for the benefit of his *cestui que trust*, or the right of a *feme covert*, in

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respect of her separate estate, to appoint an agent, and the extent of her liabilities for his acts as such agent, it is enough to say that it quite clearly appears from the evidence that the coal hole, as originally constructed by the trustee, was properly and safely built. It became dangerous to foot passengers from neglect to keep it in repair. The question then occurs, who is the responsible party, so far as the public or the plaintiff, Mrs. Merrill, is concerned? In *Robbins v. Mount*, 4 Robt. 553-559, the property, from the mismanagement of which the injury was alleged to have proceeded, belonged to minor children. Mount was the executor of the will, whose duty it was to collect and receive the income and rents of the estate for the benefit of the devisees. On the question of the liability of Mount for the imputed injury the court say: "The executor took no estate whatever in the land, his authority being a mere naked power to receive the rents, etc. The action was not therefore maintainable against the defendant, Mount, as owner. He neither placed the fixtures in the building, nor maintained them there. The owner of real property may be liable for the defective construction of his buildings or their appurtenances, without any immediate or active agency in the injury; but such liability is confined to the owner, and does not extend to agents, employees or servants of the owner."

By the charter of the city of St. Louis (§ 9, art. 16) it is provided that whenever the city shall be liable to an action like this "by reason of the unauthorized or wrongful acts, or of the negligence, carelessness, etc., of any person; and such person be also liable to an action by the party so injured, the injured party, if he sue the city for damages suffered by him, shall also join such other person so liable, and no judgment shall be rendered against the city unless judgment is rendered against such other person so liable to be sued." It then further provides that if any person shall so sue the city alone, and it appears in the progress of the trial that such other person was also liable, the plaintiff shall be nonsuited. So the party plaintiff in such actions must at his peril see that he joins the person who might be sued for such injury. If Mrs. Duffer was not liable, no other person was.

The authorities concur in saying that a married woman is liable to an action for her torts, not committed in the presence or under the supposed influence of her husband. 2 Bish. Mar. Wom., 256-7; Schouler Hus. and Wife, 134; *Dailey v. Houston*, 58 Mo. 361; *Mar-*

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shall v. Oakes, 51 Me. 308; *Wright v. Leonard*, 11 C. B. (N. S.) 259-266. Was then the neglect to keep this sidewalk in repair a tort? A tort is defined to be a civil or private wrong or injury. It consists of "injuries of omission or commission done to individuals." 1 Hill. Torts, 1. Every illegal obstruction of the highway is a nuisance. *People v. Lambier*, 5 Denio, 9; s. c., 47 Am. Dec. 273. A nuisance is a tort. It is "the use of one's own property which involves injury to the property, or other right or interest of his neighborhood." 1 Hill. Torts, 577. In short, it is an incident of the ownership of the property that the owner shall so use and control it that injury may not come thereby to another's property or person. In *Rowe v. Smith*, 45 N. Y. 238, the court, speaking of a *feme sole* owner, say: "If the defendant should permit a nuisance upon her premises, to the injury of her neighbor, would she not be liable in an action to her neighbor? The unlawful use by her of her separate estate would make the action one relating to her separate estate." And in *Dygert v. Schenck*, 23 Wend. 447; s. c., 35 Am. Dec. 575, the court say: "Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travellers, is a nuisance. Special damage arising from it therefore furnishes ground for a private action, without regard to the question of negligence in him who digs it."

It cannot avail the defendant, the owner of the property in fact, that she did not construct the coal hole. It was constructed on her property for her benefit. She suffered it to remain and get out of repair. A person who continues a nuisance is as much responsible therefor as he who creates it in the first instance. In *Davenport v. Buckman*, 10 Bosw. 32, the court say: "In this case there was no pretense that the excavation was temporary, or made for any other purpose except as a separate, permanent entrance to the cellar. It was an opening, therefore for damages arising from which those who made it or adopted and continued it were responsible." Upon a person who thus employs a part of the highway, which belongs to the public for a passway, for a private use, the law imposes the highest degree of vigilance and care to keep the same in a safe condition for the public. Any neglect of this important duty certainly should fall as fully within the terms of a positive, active tort, as if the owner of the property had committed an assault and battery upon the plaintiff. The injury probably would have been less than in this case had Mrs. Duffer assaulted Mrs. Merrill.

It is suggested that such a judgment could not be enforced on general execution. In the present attitude of married women in this State, and specially toward their separate estates, I perceive no such difficulties and embarrassment as the ancient common law threw around them. It does seem to me, with great respect, that learned judges have exhibited too much timidity, or reverence for legal antiquities, in adhering to rules after the reason for their existence has given away before our advancing civilization and broadening jurisprudence. In an early case in this State (*Benjamin v. Bartlett*, 3 Mo. 63), WASH, J., whilst holding, that where the cause of action accrues against the wife *dum sola*, it is properly brought against the husband and wife, and the judgment, of course, would go against both, yet said: "As to the husband the judgment is good; its effect upon the property or rights of the wife is another thing, and need not be considered."

So the learned judge who delivered the opinion of the Court of Appeals in this case says: "The plaintiff will be entitled to execution running against both husband and wife, but how it will be levied and satisfied we do not decide, for the question is not before us. Whether the plaintiff can in any subsequent proceeding in equity charge the wife's abutting property with the payment of this judgment, we do not now decide or intimate an opinion." We do not perceive why there should be any hesitancy on this question. Judgments are either special or general. If a party recover a general judgment, by the express provision of the statute, he is entitled to have a general execution against "the goods, chattels and real estate of the party against whom the judgment is rendered." The execution logically and of right follows the general judgment. In *Smith v. Taylor*, 11 Ga. 22, the court say: "For torts committed by the wife, not in the presence of her husband, and not by his coercion, they are jointly liable, and must be joined in the action. If there is a recovery, the judgment passes against both. If the wife has a separate property, it may be taken in execution." This declaration meets our approval, and we think it pertinent and just to the profession and courts to say so.

Other questions are raised by counsel, but they are not of sufficient importance to require discussion, and would not affect our judgment.

It must follow that the judgment of the Court of Appeals should be affirmed.

Judgment affirmed.

All concur, except HOUGH, C. J., absent.

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ABBOTT v. KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD COMPANY.

(88 Mo. 271.)

Water and water-courses — surface water — obstruction by railroad.

A railroad is not liable to land-owner for an injury by an overflow of surface water occasioned by the road-bed, skillfully constructed.*

ACTION for injury to lands. The opinion states the case. The plaintiff had judgment below.

Stringfellow, Strong & Mosman, for appellant.

Doniphan & Reed and *James W. Coburn*, for respondent.

RAY, J. This action was begun in the Circuit Court of Platte county, Missouri, by the plaintiff to recover for the loss of crops and injury to his lands, situated in the north-west quarter, the south-west quarter, and the south-east quarter of section 29, township 54, range 36, in Platte county, Missouri. Said lands and crops were injured and damaged in April, 1876, by overflow, which is charged to have been occasioned by defendant's negligence. The petition is set out in two counts.

[Omitting details.]

The answer of the defendant was a general denial of the allegations of the petition contained in either count thereof. The trial was had before a jury and a general verdict was returned in plaintiff's favor, assessing the damages at \$300. After unsuccessful motions for a new trial and in arrest, judgment was entered thereon for the plaintiff, and the defendant appealed therefrom to this court.

It will be seen from the petition, whose two counts are set out in substance above, that the first seeks to recover for the alleged negligence of defendant in building its bridge over said stream called Bear creek, and for a negligent interference with the flow of its waters, while in the second count a recovery is sought for the negligence of the defendant in failing to provide water-ways sufficient

* See *Louisville, etc., R. Co. v. Hays* (11 Lea, 382), 47 Am. Rep. 291, and note, 296; *Drake v. Chicago, etc., R. Co.* (68 Iowa, 302), 50 Am. Rep. 746.

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to accommodate and carry off the surface waters falling on the surrounding and adjacent country, and such as may have escaped the banks of said creek by reason of its overflow, and thence spread out over the adjoining country. With regard to these different classes of waters we think different rights exist, and different rules of law are to be applied. Unless authorized by appropriate and constitutional statutory enactment, no one can, in any material manner or extent, interfere with the waters of a running stream. Such an interference with a stream is *per se* a nuisance, for it is a maxim of the law in regard to such streams, that the water runs and ought to run, as it has been accustomed to run. Where there is lawful authority for the construction of bridges, or other structures over or upon such stream, the party building the same is liable for any negligence in the mode or method of doing the work.

The cause of action alleged in the first count of the petition is not for the construction of said bridge over Bear creek, without authority of the law. In such case the mere interference to a material extent with a running stream is actionable by one suffering damage thereby, without proof of negligence. Bear creek, it seems, is a local stream of some seven or eight miles in length, and rising in the bluffs, flows out into the bottoms, and approaches the railroad from a north-east direction. Section 765, Revised Statutes, authorizes railroad companies to construct their road across, along or upon any stream or water-course * * * which the route of its road shall intersect or touch, but provides that the company shall restore the stream or water-course to its former state, or to such state as not unnecessarily to impair its usefulness. As railroads are then authorized by law to bridge streams of the character of Bear creek, we must, in the absence of averment in the petition to the effect that said bridge was constructed unlawfully, assume that the defendant had the legislative sanction to construct over or upon it a proper bridge of suitable material, height, width and dimensions. In such case its liability is not an absolute or unconditional one, but if in the construction of such a bridge over such streams damage is unavoidably done, or merely results incidentally from such proper construction thereof, such damage is, we think, *damnum absque injuria*. The cause of action however, as distinctly set out in the first count, is for a misfeasance, or the construction of said bridge in a negligent and unskilful manner, and the negligence complained of consists in the two specified par-

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ticulars, to-wit: In building the bridge too low, and in placing the piling so near together as to obstruct the channel and dam up the waters of the creek. The assignment of these two grounds of negligence constitutes the sole cause of action contained or set forth in said first count, and under a number of decisions of this court, no other inquiry could properly be authorized, or permitted, or submitted to the jury for their determination. The instructions however, given in the case at the instance of the plaintiff and by the court of its own motion, do not, we think, thus limit and confine the inquiry as to the alleged negligence or unskilfulness of defendant in the construction of said bridge.

[Omitting discussion of first count.]

But we scarcely need prosecute this branch of the case any further; it only remains therefore to notice the second count, and consider the rights and duties of the defendant in the construction of its road-bed and track along and through the bottom lands described in the petition with reference to the safety of the road-bed and track, the security of the travelling public, and the injury resulting to the neighboring land proprietors from the unavoidable obstruction and deflection of the flow of surface water, incident to a careful and skillful construction of the same. We assume that the waters in question, overflowing as they did the banks of the creek, in consequence of the insufficiency of the natural channel of the same to hold and carry off, through the bottom, are "surface waters" within the meaning of that term, as used and defined in the books and authorities on that subject. *McCormick v. K. C., St. Jo. & C. B. R. Co.*, 57 Mo. 438; s. c., 70 Mo. 359; s. c., 35 Am. Rep. 431. We assume further that the defendant was authorized by its charter, the statutes of the State, and proceedings thereunder, to construct its road-bed and track through the bottom lands in question. Indeed this is conceded by the petition itself; and we further assume that in doing so, it was bound to exercise reasonable care and skill, with reference to the safety and security of its road-bed and track, and to the travelling public; and at the same time we also assume that it was equally bound to see that no unnecessary injury was done to adjoining proprietors, by the obstruction and deflection of surface water incident to such careful and skillful construction of the same. This duty rests with equal force upon the defendant in both respects, and whether there has been a failure to discharge that duty in a given case, in any material particular,

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either by failure to provide sufficient water-ways when necessary and proper, or by failure to exercise reasonable care and skill in any other particular, is a question of fact to be determined by the jury under proper instruction from the court, with reference to the particular facts in each case. In these assumptions we think we are fully authorized and justified by all the earlier and later as well as the best considered adjudications of this court. These positions are, we think, equally well fortified by the standard common-law text-writers on this subject.

It may be well to premise, as we have seen, that the authority of defendant to construct the road-bed and track is not controverted in this case. It may be well also to examine somewhat the facts of the case, as shown by the evidence, in reference to the nature and surface of the ground or bottom through which this part of defendant's road is built, the capacity or want of capacity of the natural channel of Bear creek to hold and carry off through the bottom the superabundant waters flowing into the same from the neighboring hills in which the creek takes its rise, in times of violent rain-storms such as caused the overflow in question; the character and nature of the surface of the ground in the bottom adjacent and near the point at which the overflow in question occurred, and also how the waters, thus overflowing the banks of the creek, were accustomed to spread out everywhere and flow in all directions over the bottom lands through which the road was constructed, without channels, sloughs or swales to collect and carry them off in any thing like well-defined banks or borders. As we have seen, the defendant's road at this point is built through the nearly level bottom land of the Missouri river, on a grade nearly even with the general surface of the ground, not far from and parallel to the range of bluffs to the north-east. Bear creek, as we have seen, takes its rise some seven or eight miles in a broken hilly country to the north-east, and by its rapid current in times of violent storms precipitates an immense volume of water into its channel, which after it leaves the bluffs is and always has been wholly insufficient to hold and carry off through the bottom along and through which the road-bed and track in question are built. In consequence of the inadequacy in the channel of the creek, the waters thus overflowing its banks are accustomed, and always have been, to spread out in all directions and flow over the bottom along and through which defendant's road is situated. That we are fully

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justified in making the assumptions above stated, it is only necessary to refer briefly to the earlier and later adjudications of this court, and the acknowledged text-writers on the subject.

In the case of *McCormick v. K. C., St. J. & C. B. R. Co.*, 57 Mo. 433 and 437, this court uses this language: "There is no doubt but that the authorities of towns and cities, whose duty it is to keep the streets and public ways in good repair for the use of the public, may repair the same in a reasonable manner, without incurring any liability to adjoining proprietors, even though said improvements may cause a change in the natural flow of surface water to their injury. * * * The general rule however is that either municipal corporations or private persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other improvements thereon to make it fit for cultivation, or other profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors, to their inconvenience or injury. * * * The same rule would apply to waters flowing over the country, which had escaped from the banks or natural channel of a running stream of water occasioned by heavy rains or the melting of snow upon the surrounding country. But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. * * * He must improve and use his own lands in a reasonable way, and in so doing he may turn the course of and protect his own land from the surface water flowing thereon, and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own lands against the common enemy of all, * * * so as to occasion no unnecessary inconvenience or damage to plaintiff."

In the case of *Hosher v. K. C., St. J. & C. B. R. Co.*, 60 Mo. 329 and 333, this court affirms the *McCormick* case, *supra*, and after treating of natural streams employs this language: "But in the case of surface water, which is regarded as a common enemy, he is at liberty to guard against it or divert it from his premises,

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provided he exercises reasonable care and prudence in accomplishing that object. In the language of this court in a recent case, where this subject was carefully considered, the owner of the dominant or superior heritage must improve and use his own lands in a reasonable way, and in so doing he may turn the course of and protect his own land from the surface water flowing thereon, and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own lands against the common enemy of all. So in the case of *Jones v. Hannovan*, 55 Mo. 462, the same doctrine is recognized, and it is there held that "a proprietor of land may drain surface water from his land in such way as may suit him, provided he does so in a usual and careful manner, without being responsible to others; but such water, after emptying into a stream, ceases to be surface water and becomes a part of the stream." In the case of *Imler v. City of Springfield*, 55 Mo. 119; s. c., 17 Am. Rep. 645, the same common-law rule is recognized and affirmed; and in the case of *Clark's Adm'r v. H. & St. Jo. R. Co.*, 36 Mo. 224, the court uses this language: "In the absence of any negligence, unskilfulness or mismanagement in the construction of the embankment, or the road-bed, the injury thereby done to plaintiff's property must be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do, and such damage must be taken to have been included in the compensation assessed, or it was *damnum absque injuria*."

In the recent case of *Benson v. C. & A. R. Co.*, 78 Mo. 504 and 512, this court, speaking through PHILIPS, C., practically reaffirms the common-law doctrine of the earlier decisions of this court in respect to surface water. After referring to natural water-courses, this language is used: "But as to the right of a dominant proprietor to divert mere surface water and turn its flow upon his neighbor, there is much conflict and confusion. Each case must, in large measure, depend on its own peculiar facts; the general rule, it is true, applicable to the enjoyment of real estate, is expressed in the maxim, *cujus est solum, ejus est usque ad cælum*. He has ordinarily the right to use and improve his real estate by protecting it against water flowing over its surface. In doing so the dominant proprietor may turn it from his land on to the ser-

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vient or lower land, without liability to damages. Mere surface water, that which does not run in any defined course or confined channel, is regarded as a common enemy against which any land-owner affected by it may fight. * * * But in doing so regard must be had to another recognized maxim, *sic utere tuo ut alienum non lædas*. * * * The deed from plaintiffs concedes to this company the right to make embankments, if necessary, and to construct culverts and ditches deemed necessary for the proper grade and protection of the road. And if in the legitimate exercise of such right the flow of surface water from plaintiff's land was obstructed, to their injury, it would clearly be a case of *damnum absque injuria*." In a still later case the court, through the same commissioner, affirms and announces the same common-law rule, as to surface waters, as is held in all the earlier cases from this court where that doctrine is discussed. See *Stewart v. City of Clinton*, 79 Mo. 603; see, also, Angell on Water-courses (7th ed.), p. 120, § 108, also §§ 138, 139.

The statute of this State, section 3117, page 521, declares that "the common law of England * * * shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding." This statutory obligation and duty has been recognized and enforced, as we have seen, in all the earlier and later adjudications of this court on this subject. In fact the rule of the common law on this subject was never questioned in this State or departed from until the case in *McCormick v. K. C., St. J. & C. B. R.*, 70 Mo. 359, where the "civil law" on this subject was first stated and approved, and the succeeding case of *Shane v. Railroad Co.*, 71 Mo. 237; s. c., 36 Am. Rep. 480, where it was elaborately discussed and adopted as the rule of action and decision in this State on the question of the flow of surface water.

In the last two cases it was distinctly held, by a divided court it is true, that "a land owner has no right, by erecting an embankment, to stop the natural flow of surface water or to divert its course so as to throw it upon the land of his neighbor," thus discarding the old common-law rule on this subject, so long recognized and so often approved, and substituting therefor the rule of the "civil law." With all due respect for the acknowledged ability of the distinguished jurist who wrote those opinions, we feel constrained to recognize the common-law doctrine on this subject, so often and repeatedly approved by this court, without division,

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in all its earlier and later decisions, as still the law in this State. The rule of the common law, as expounded in the numerous decisions quoted above, we think, after all, best promotes and conserves the varied and important interests of both the public and private individuals incident to and growing out of this question. It permits and encourages public and private improvements, and at the same time restrains those engaged in such enterprise from unnecessarily or carelessly injuring another. It may be added in this connection that whatever change may have been made in the common-law duties and obligations of railroad companies in this particular by section 810, Revised Statutes, does not arise, and is immaterial in this case, since the suit is not brought for a failure to construct the ditches and drains along the sides of the road-bed required by that act, but for a failure to provide water-ways or culverts across the road-bed, or through its embankments, so as to allow the surface water to pass off in that direction. A strict and literal application of the doctrine of the "civil law" would, we think, in many places, and in large districts of country, materially retard, if not utterly destroy many useful and profitable improvements, pursuits and enterprises besides railroading. *Sowers v. Sheff*, 15 La. Ann. 300; *Martin v. Jett*, 12 La. 503.

Numerous decisions in various other States also adopt and adhere to the common law as to surface water to the same extent as do the adjudications in this State. *Turner v. Dartmouth*, 13 Allen, 293; *Hoyt v. City of Hudson*, 27 Wis. 656; s. c., 9 Am. Rep. 473; *Pettigrew v. Evansville*, 25 Wis. 223; *Bowlsby v. Speer*, 31 N. J. L. 351; *Swett v. Cutts*, 50 N. H. 439; s. c., 9 Am. Rep. 276; 58 Barb. 413; *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278; and 24 Alb. L. J. 453.

In accordance with these views the judgment of the Circuit Court in the *McCormick* case, *supra*, should have been affirmed and not reversed and remanded by the court. And it may be said of the *Shane* case, 71 Mo. 237; s. c., 36 Am. Rep. 480, that it was rightly decided "on common-law principles," if the court was right in recognizing the slough in question as a "water-course," within the meaning of that term, which as shown by the opinion it evidently did, when in the end it came to decide the case. The slough in the petition is spoken of as a "natural channel" from the river to the lake, and thence to the river again. The first instruction for plaintiff on which in the end the case was made to turn (page

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242), treated the slough as a natural drain through which the surplus water of the Missouri river in high stages usually and naturally passed, and the opinion itself, on page 251, referring to said slough and said first instruction says, that "the question as to the slough being the natural channel through which the waters of the Missouri river passed in times of floods, was put to the jury in an instruction given by the court and was found by the jury, and upon the evidence submitted they could not have found otherwise than they did." And on page 252 the court, in finally deciding the case, says that "the first instruction given for the plaintiff contained all the law necessary to enable the jury to pass upon the facts submitted, and the second and third, and the sixth given for defendant certainly cannot be complained of by defendant." It will be observed however by reference to page 244, that the second and third instructions, which were treated by the court as having been given for the defendant, were in fact refused, and under the view expressed in this opinion they should have been given. It is clear therefore if the court was right in treating and recognizing the slough in question as a natural channel or water-course, within the meaning of those terms, the case was properly and rightly triable and determinable upon common-law principles, without calling in the aid of the civil law, and in that event, all that was said about the civil law was unnecessary and mere *obiter dicta*. We do not wish however to be understood that the court was right in so treating the slough in question as a natural channel or water-course within the meaning of that term when properly used. Indeed we think not; but it is unnecessary for the purposes of this case, to further pass upon that question.

The general proposition announced in the second, third and sixth instructions for plaintiff at his request, and all four of those given by the court, upon its own motion, recognize and apply, as we think, the doctrine of the civil law rather than the common law, and for that reason are erroneous. The defendant was confessedly authorized to build its road-bed and track through said low lands, and was sought to be charged only for negligence and unskilfulness in its construction; yet singularly enough, by these instructions it is held liable for simple failure to provide sufficient water-ways, without any reference to the safety and security of the road-bed and the travelling public, and without any reference to the exercise of reasonable care and skill in the construction of the same; all this,

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as we understand them is practically ignored in these instructions, which are as follows:

[Omitting them.]

The giving of these instructions therefore was error. For these reasons the judgment of the trial court is reversed and the cause remanded, to be proceeded with in conformity hereto.

Judgment reversed and cause remanded.

HOUGH, C. J., concurring. I adhere to the views expressed by me in my dissenting opinion in the case of *Shane v. Kansas City, St. Joseph & Council Bluffs R. Co.*, 71 Mo. 253; s. c., 36 Am. Rep. 480, which I think are approved by the foregoing opinion.

All concur.

ASKEW V. LA CYGNE EXCHANGE BANK.

(83 Mo. 303.)

Assignment for creditors — in another State — attachment.

A voluntary general assignment for creditors made in another State, if not in conflict with the laws of Missouri, will convey personal property in Missouri as against subsequent attaching creditors residing there.*

THE opinion states the case.

Karnes & Ess, for appellant.

Gage, Ladd & Small, for respondent.

EWING, C. J. The appellants, on the 27th of February, 1880, brought this suit against the La Cygne Exchange Bank, a banking corporation created under the laws of the State of Kansas, and theretofore doing business as such at La Cygne in that State. The suit was by attachment, and notice of garnishment was on the same day served on the Merchant's National Bank of Kansas City, as garnishee. In due time the garnishee answered, stating that at the time the notice was served it had in its possession the notes of several parties which had been placed in its hands by the Kansas bank as collateral security for a debt owing by the latter to the garnishee.

* See *Rhawn v. Pierce* (110 Ill. 350), 51 Am. Rep. 691.

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After this answer was filed, the respondent Moore, as assignee of the Kansas bank, filed his interplea, claiming to be the owner of the notes, subject only to the lien of the pledge mentioned in the garnishee's answer. The appellants answered to the interplea denying the claim set up. The garnishee's answer was taken as true by all the parties to the suit, and the contest between the appellants and respondent was over the surplus which it was supposed would remain in the hands of the garnishee after the payment of the debt due to it.

The issue between the interpleader and appellants was tried by the court without a jury upon the facts as agreed upon by the parties, and which were substantially as follows:

The La Cygne Exchange Bank was a banking corporation organized under the laws of the State of Kansas, and had been doing business as such at La Cygne in the county of Miami, in said State, since the year 1876. At noon on February 25, 1880, the bank made an assignment of all its property and effects for the benefit of all its creditors. This assignment was made in conformity with the laws of the State of Kansas upon that subject. Immediately upon the making the assignment the assignee took possession of the property and effects. The interpleader is the assignee, and undertook the execution of his trust, and that all the proceedings of the assignee subsequent to the making of the assignment had been in strict conformity to the laws of the State of Kansas; that the property attached in the garnishees had been pledged to the garnishee bank by the debtor bank long before the assignment, as collateral security for certain debts due by the latter to the former; that the appellants were residents and citizens of Missouri; the garnishee bank was located in Missouri and the debt payable in Missouri. The laws of the State of Kansas governing assignments for the benefit of creditors were made part of the case, and were in all material matters substantially the same as those of Missouri upon the same subject.

The court refused to declare the law to be that upon the pleadings and evidence the interpleader could not recover, and made its finding for the assignee (the interpleader), and rendered judgment accordingly. The attaching creditors took this appeal.

It will be seen that the precise legal proposition we have to decide is this: Does a voluntary assignment, for the benefit of all the creditors of the assignor made in the State of Kansas, of the debt due from a citizen and resident of this State, to the assignor, a resident of Kansas, pass the debt to the assignee at the time of the

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assignment, so as to defeat a subsequent attaching creditor of the assignor in this State, whose attachment is issued and the debtor of the assignor garnished after the making of the assignment?

There has been much discussion of questions similar to this, but it will neither be necessary nor profitable to undertake a thorough review of the conflicting adjudications. The case of *Bryan v. Brisbin*, 26 Mo. 423; s. c., 62 Am. Dec. 219, is similar to the one at bar, with the important exception that in that case the deed of assignment was in conflict with the laws of Missouri, and could not have been enforced here, while it is admitted that the assignment in the case at bar would be valid in Missouri. In *Einer v. Beste*, 32 Mo. 240, the plaintiff and defendant were both residents of Louisiana. The defendant was insolvent, and had instituted proceedings for discharge under the insolvent laws of Louisiana. The plaintiff, by a suit of attachment in this State, sought to obtain priority of the other creditors. After a somewhat exhaustive review of the authorities, Judge RAY held that the assignment was good as against this attaching creditor. The same question was similarly decided by this court in *Thurston v. Rosenfield*, 42 Mo. 474.

In *Ockerman v. Cross*, 54 N. Y. 29, it is held that a voluntary assignment by a debtor residing in another State, valid by the laws of that State, and not in conflict with any law of New York, operates as an assignment of the debtor's property in New York, and the assignees can hold the same against attaching creditors of the debtor. See also 40 Barb. 465, to the same effect.

In *Speed v. May*, 17 Penn. St. 91; s. c., 55 Am. Dec. 540, it was held that "a voluntary assignment, made by the owner in Maryland who resided there, passed property in Pennsylvania to the assignee as against an attachment subsequent to the assignment." The same question is similarly decided in *Hanford v. Paine*, 32 Vt. 442; *Gatewood v. Whitlock*, 9 Fla. 86; *Miller v. Kernaghan*, 56 Ga. 155; *Gregg v. Sloan*, 76 Va. 497; *Law v. Mills*, 18 Penn. St. 185; *Johnson v. Sharp*, 31 Ohio St. 611; s. c., 27 Am. Rep. 529; *May v. Wannenmacher*, 111 Mass. 202; *Caskie v. Webster*, 2 Wall. Jr. 131.

Mr. Justice STORY, in discussing the question (Story Conf. Laws, § 411) says: "There is a marked distinction between a voluntary conveyance by the owner, and a conveyance by mere operation of law, in case of bankruptcy, *in invitum*. * * * In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition

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of his property *in invitum*. But a statutable conveyance made under the authority of any legislature cannot operate on any property except that which is in its own territory. This makes a solid distinction between a voluntary conveyance of the owner, and an involuntary legal conveyance by the mere authority of law. The former has no relation to place; the latter on the contrary has the strictest relation to place." And he concludes by saying: "It is therefore admitted, that a voluntary assignment by a party, according to the law of his domicile, will pass his personal estate, 'w' atever may be its locality, abroad as well as at home. But it by no means follows that the same rule should govern in cases of assignments by operation of law." See note 2, to this section. Such an assignment would, if valid when made, be upheld in the State where the property is found, unless its operation is limited or restrained by some law or policy of the latter. 32 Vt. *supra*; 54 N. Y. *supra*. Burrill Assignments, §§ 302, 309, maintains the same general doctrine.

A contrary doctrine seems to prevail according to some authorities cited by the appellant. One is the case of *Johnson v. Parker*, 4 Bush (Ky.), 149; but that is virtually overruled by a much later decision (1884, *Atherton v. Ives*, 20 Fed. Rep. 894), where the general rule as referred to is maintained. He also refers to other cases seemingly irreconcilable. But notwithstanding, we think it may be assumed from the weight of authority that the rule is, that involuntary assignments by operation of law do not operate beyond the territory of the State under the laws of which such compulsory assignment may be made; but that a voluntary, *bona fide* assignment of personal property, wherever situated, passes it to the assignee at the time of the assignment, and will have priority over subsequent lienors; provided it is not in conflict with some positive or customary law of the State where the property may be located.

It is admitted in this case that the assignment laws of Kansas and Missouri are substantially similar. That the assignment under consideration would be valid if made in this State. It also appears that the attaching creditor can claim no preference over the general creditors in point of merit. We must therefore hold that the assignee will take the property in preference to the attaching creditor, and there is nothing in the law nor inter-State comity which would justify the courts of this State in holding otherwise.

The judgment below is therefore affirmed.

All concur.

Judgment affirmed.

Donahoe v. Wabash, St. Louis and Pacific Railway Company.

DONAHOE V. WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

(83 Mo. 500.)

Negligence — contributory — rescuing child.

It is not contributory negligence in a mother to attempt to rescue her infant child from an approaching railroad train, although she may have negligently allowed it to go on the track.

But the defendant is not chargeable, unless it was negligent in respect to the child before, or in respect to the mother or child after, the attempt at rescue.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

H. S. Priest, for appellant.

John Montgomery, E. A. Andrews and U. S. Hall, for respondents.

HENRY, J. This suit is for the recovery of damages for injuries sustained by plaintiff, Mary, in attempting to rescue her child alleged to have been on the defendant's track in front of an approaching freight train. The evidence in the case does not, except in a few particulars which will be noted, differ very materially from that in the case of these plaintiffs against this defendant, for the killing of the child, decided at this term.

Mrs. Donahoe testified that the child was lying on the rail of the track trying to cross it. She did not so testify in the other case. Mrs. McAuliff testified that when she first saw the child it was lying across the rail on its hands and feet and the little girl was pulling it. This she did not testify to on the former occasion. Murray, the engineer, testified in this case "that he did not keep the woman in his vision all the time, didn't see her raising her hand or making any signal whatever." In the other case he testified that "she seemed to be excited and running faster. The indications of her excitement were quick movements, moving her arms, running and waving her hands." Also, "that he was about 600 feet from the child when he shut off steam, running twenty-five miles per hour; that he was 200 feet when he reversed the engine. Did not call for brakes before he shut off steam, but couldn't say whether he called for brakes before he reversed the engine."

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It is unnecessary to state the evidence in relation to the alleged contributory negligence of the plaintiffs in permitting this child to be upon the track. The question was properly submitted to the jury in instructions given. The court gave five instructions of its own motion, seven asked for by plaintiffs, and refused twenty requested by defendant. Counsel who ask so many instructions in a cause in which two or three, at most, could be submitted embracing all the law applicable, cannot expect this court to embody them in its opinion or notice them in detail. I shall not attempt it on this occasion, but ascertain if I can and declare the law and then determine whether the instructions given fairly presented it to the jury. Mr. Wharton in his work on Negligence says it was properly held in *Eckert v. R. Co.*, 43 N. Y. 502; s. c., 3 Am. Rep. 721, "that a railroad is to be held liable for running over one who seeks to save a little child on its track whom it is about negligently to strike." Section 314, Mr. Pierce in his work on Railroads says: "The fact that the injured person did some act by which he incurred or increased danger does not necessarily involve negligence which will prevent recovery when the danger was created by some unlawful act of the company." Page 328, he cites with approval *Eckert v. R.*, *supra*; *Linnehan v. Sampson*, 126 Mass. 506; s. c., 30 Am. Rep. 692; and *Gov. St. R. Co. v. Hanlon*, 53 Ala. 70. The two cases last cited approve the doctrine of the case of *Eckert v. R.*, *supra*; which is also approved by Shearman and Redfield in their work on Negligence. The case of the *Evansville Ry. Co. v. Hiatt*, 17 Ind. 102, is not in conflict with the foregoing authorities. There no negligence of the railroad company was proved, nor from the report of the case does it appear that such negligence was alleged and the court in its opinion says "they were guilty of no manner of negligence whatever."

It is to be observed that it is only when the railroad company, by its own negligence created the danger, or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person and recover for an injury he may sustain in that attempt. For instance, if a man is lying on the track of a railroad intoxicated or asleep, but in such a position that he could not be seen by the men managing an approaching train and they had no warning of his situation, and another seeing his danger should go upon the track to save his life and be injured by the train he could not recover,

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unless the train men were guilty of negligence, with respect to the rescuer, occurring after the beginning of his attempt. If the railroad company is not chargeable with negligence with respect to the person in danger, the case of the person who attempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct toward him and his in making the attempt. In other words, the negligence of the company, as to the person in danger, is imputed to the company with respect to him who attempts the rescue, and if not guilty of negligence as to such person, then it is only liable for negligence occurring with regard to the rescuer, after his efforts to rescue the person in danger commenced.

If this child was on the track, as testified by its mother and Mrs. McAuliff, as between the company and the child, the train men were guilty of negligence in not seeing it, because the engineer had seen the children and the two women near the track and it was his duty to keep a lookout. *Frick v. R.*, 75 Mo. 610. If it was not on the track, as he and others testified, and not seen approaching the track until the locomotive was so near it that the train could not have been stopped in time to avoid striking it, then no negligence is imputable to them, nor in that case can negligence be imputed to them, unless it was in not stopping the train when they saw the conduct of the women running upon or near the track. If the evidence should establish the fact that the engineer saw these women and children near the track, from a point one-fourth of a mile west of where the child was struck, and that immediately after he saw the women get upon the track, run toward the train greatly excited and waving their hands and a red shawl, and after seeing this could have stopped or so checked the speed of the train that the mother could have rescued her child and not herself been struck by the engine, plaintiffs are entitled to recover whether they were guilty of the alleged contributory negligence or not. If the defendant's servants were guilty of negligence, after Mrs. Donahoe got upon the track, in not stopping or checking the speed of the train, that cancels her prior contributory negligence and takes that question out of the case, if it was ever properly in it. Their contributory negligence in permitting the child to be on the track would not prevent a stranger from recovering damages for an injury sustained in attempting its rescue, and we are inclined to the opinion that the mother or father would have the same right and

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certainly a much greater inclination to save its life. No negligence is imputable to a child as young as the one killed by this train.

The fifth instruction given at plaintiff's request, is as follows: (5) "The court instructs the jury that although the infant child of plaintiffs had no right upon the track of defendant's railway, yet the fact that he was there did not discharge the defendant's employees from the observance of due care and watchfulness toward him, nor did it give the defendant or its employees any right to run over him if that could have been avoided by the exercise of ordinary care and watchfulness."

It was manifestly improper to give the instruction. The testimony for plaintiff tended to prove that the child was on the track when the train was a fourth of a mile or more distant and continued on the track until it was killed, while that of defendant was to the effect that when the train was within about two hundred feet of the child, it not having before been on the track, it appeared between the rails. If it got upon the track at the time stated by defendant's witnesses, it was impossible for the train men to avoid striking it, if defendant's uncontradicted testimony is to be credited, as to the time within which the train could have been stopped or checked, so as to have avoided striking the child. Except upon the assumption that the child was upon the track at a time when the train men could have avoided injuring it by the exercise of due care, the instruction is wholly inapplicable to the case; and if the child got on the track at the time testified to by the engineer and other of defendant's witnesses, and the assumption in the instruction that it was upon the track related to that time, it instructs the jury with regard to the degree of care to avoid doing what then could not possibly have been avoided. The instruction could have served no purpose but to mislead or confuse the jury.

The seventh for plaintiff is still more objectionable. It asserts that Mary Donahoe had a right to make every effort to rescue her child and was not to be charged with contributory negligence in the attempt, in the manner made, unless she made such efforts under the circumstances as would constitute rashness in the judgment of prudent persons. This entitled plaintiff to a recovery, whether defendant was guilty of any negligence or not, provided she was not guilty of rashness in the attempt to save the child. This as we have seen is not the law. The defendant is not chargeable with her injury, unless it was guilty of negligence with respect to

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the child before the mother attempted its rescue, or with respect to the mother or the child after her efforts to save the child commenced.

I have not attempted, because I do not deem it important, to note all the objections to instructions given and refused, but have endeavored to declare the law applicable to the case in a manner that will enable the lower court to avoid the errors which the instructions contain and give proper instruction on a re-trial of the cause, earnestly urging the importance of declaring the law in as few brief instructions as possible. For the errors above noted, the judgment is reversed and the cause remanded.

Reversed and remanded.

All concur.

SPRINGER V. HALL.

(88 Mo. 602.)

Evidence — handwriting — expert — comparison.

On the question of the genuineness of the signature of a note in suit, an expert witness, who has never seen the defendant write, may not testify to his opinion founded on a comparison with the defendant's signature of the plea in the suit.

SUIT on a note. The opinion states the case. The defendant had judgment below.

Ed. Buler, for plaintiff in error.

Joseph Cravens, for respondent.

EWING, C Suit on a negotiable note alleged to have been made by defendant to the order of S. D. Cox and by him indorsed to plaintiff. Answer *non est factum*. The defendant signed and swore to his answer. Plaintiff introduced the payee and indorser, Cox, as a witness who testified to the making and delivery of the note to him. Then read the note in evidence, and offered other evidence tending to show admissions of the defendant.

Defendant as a witness in his own behalf testified that he did not sign the note. Defendant then introduced one Napton as a witness

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who stated that he was engaged in an occupation requiring more or less acquaintance with and examination of the handwriting of different persons, but had never seen the defendant write and was not acquainted with his handwriting. Defendant then offered to exhibit to the witness the answer of defendant to which was attached the sworn signature of the defendant, to have the witness compare the signature to the affidavit and answer, with the signature to the note in controversy, and state as an expert whether the two signatures were made by the same person. The witness stated that they were not made by the same person, and that the note was not signed by the defendant. To this the plaintiff objected. The defendant then offered to submit the answer of the defendant bearing the sworn signature, and the note sued on to the jury that they might compare the signatures, with a view of forming an opinion of the genuineness of the signature to the note. This was permitted, against the objections of the plaintiff. There was a verdict and judgment for the defendant and the case is here for review.

I. The only questions for consideration are: 1. Did the lower court err in permitting the witnesses to examine the genuine signature of the defendant to his affidavit, and compare it with the signature to the note? 2. Did the court err in submitting the genuine signature to the affidavit, and the one appended to the note, to the jury for their examination and comparison?

All evidence of the genuineness of handwriting must in the nature of the thing be by comparison, except in cases where the witness saw the document written. The admissibility of some evidence of this kind is well-established. The knowledge of the handwriting of another may be derived from seeing him write; or from seeing letters and other documents purporting to be in the handwriting of the party, who afterward acted upon them as his own, and adopted them in business transactions as genuine. 1 Greenl. Ev., § 577. But it has also been held that where other writings admitted to be genuine are already in the case, experts may be permitted to compare them with the instrument in question, and testify their opinion concerning the genuineness of the writing. And in such case also, the two writings may be submitted to the jury and compared by them with or without the aid of experts. 1 Greenl. Ev., § 578.

In *Moore v. United States*, 91 U. S. 270, it was said: "The only

question of importance is whether the signature to the document * * * purporting to be executed by the claimant, was properly proved. The court compared it with his signature to another paper in evidence for other purposes in the cause, respecting which there seems to have been no question; and from that comparison, adjudged and found that the signature was his. Had the court a right to do this? The general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury." To a similar effect is *Brobston v. Cahill*, 64 Ill. 356; *Baker v. Haines*, 6 Whart. 283; s. c., 36 Am. Dec. 254.

The question discussed in *State v. Clinton*, 67 Mo. 380, is somewhat different. There the inquiry was, is it proper to allow experts in comparing handwriting to give their opinion as to the genuineness of a signature, by comparing it with other writings proved to be genuine, but not connected with the cause? This court in that case adopted the rule as laid down by Greenleaf as follows: "That such papers can be offered in evidence to the jury only when no collateral issue can be raised concerning them; which is only when the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are papers belonging to the witness who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation of his own testimony." 1 Greenl. Ev., § 581. See also *State v. Scott*, 45 Mo. 304.

II. But the trial court, in this case, goes further. It permits an expert to be called who never saw the writer of the names write, and express his opinion as to the genuineness of the note sued on by comparing it with the signature of the defendant in his plea of *non est factum*. It seems that the authorities will not sustain this position. It is said the temptation to manufacture evidence is too great. "The knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered." Bes on Ev., § 236. In *Stranger v. Searle*, 1 Esp. 14, Lord KENYON rejected the evidence of a witness who stated that he had seen the defendant write his name several times before the

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trial, who wrote it to show the witness his true manner of writing, so that witness might be able to distinguish it from his alleged signature on the acceptance. The reason given was that defendant might have disguised his writing intentionally. This seems to be the ground of rejecting such evidence and the full extent of the rule is as above stated by this court in 67 Mo. 380, and which also seems to be in harmony with all the better authorities. 1 Whart. Ev., § 707; 91 U. S., *supra*; *King v. Donahue*, 110 Mass. 155; s. c., 14 Am. Rep. 589; *Miles v. Loomis*, 75 N. Y. 288; s. c., 31 Am. Rep. 470; *Brobston v. Cahill*, 64 Ill. 356; *U. S. v. Chamberlain*, 12 Blatch. 390. The judgment below is therefore reversed and the case remanded.

Judgment reversed.

All concur.

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CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

HOLMES v. CITY OF MATTOON.

(111 Ill. 27.)

Constitutional law — permitting municipal corporations to appeal without security.

A statute permitting municipal corporations to appeal without giving security as required in other cases is not unconstitutional.

MOTION to dismiss appeal. The opinion states the case. Motion denied below.

Craig & Craig, for plaintiff in error.

T. L. McGrath, for defendant in error.

WALKER, J. In this case there was an appeal by the city to the Appellate Court for the Third District. In that court a motion was made to dismiss the case, because the city had, under the act of 1879 (Sess. Laws, 222), appealed without giving bond. It is now urged that section 71, as amended by that act, is unconstitutional, because it relieves all municipal corporations from the law requiring appellants and plaintiffs in error, on obtaining a *supersedeas*, from giving bond.

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It is urged that section is violative of the Constitution, because it is special or local legislation. Nothing could be more manifest than that it is not local, because its operation extends to every portion of the State. This is too manifest to require the slightest notice. Had not cases been referred to that to some extent favor the position of appellant that it is special legislation to allow such appeals, we should have been inclined to hold that the proposition could not be raised to the dignity of a constitutional question, and have dismissed it without consideration. We apprehend that no one will or can seriously contend that the State, or the sovereign body exercising the functions of a State, can be sued without its consent and permission; nor can its power to sue and prosecute suits in all of their various stages be limited or controlled, except by its sovereign power properly exercised; nor can the State representing sovereignty be rendered liable for costs or damages in prosecuting or defending suits or legal proceedings, unless it so expressly declares by constitutional provision or legislative enactment. The State, whatever its form or its powers, has the unquestioned right, as representing the sovereign power, to prosecute and defend all suits; and maintain all legal proceedings without cost or other restrictions, unless imposed by fundamental law, or self-imposed by legislative enactment. These are axiomatic principles, always admitted and never controverted. From and before the organization of the State it has ever prosecuted and defended suits, criminal and civil, without liability for costs, damages or forfeitures, and has prosecuted, writs of error without bonds or any restrictions whatever — and it is from the fact that sovereign power is not liable to be sued or put to expense in the assertion of its rights, and enforcing the laws for the protection of the governed against violence, wrong and oppression, and to protect them in the enjoyment of their rights of life, liberty and general security. It is believed that in no government, in ancient or modern times, has it been required to give bond for the payment of the costs of litigation, before bringing suit, or an appeal, or on error. Such a proposition would be unheard of in the history of government, and no one having the slightest knowledge of the principles of government will contend that any such restriction exists. This being true of the State government, it is necessarily true of all its officers, agents and instrumentalities, while employed in seeking the rights of the government in the courts of justice. Hence officers suing for or defending the rights of the

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State are acting for and in the stead of the State, and to that extent not only may but should be permitted to do so on the same terms and for the same reasons the State is permitted to sue for or defend its rights.

Again municipalities, such as counties, cities, villages, towns, school districts, and in the language of the act, "all other municipal corporations," and the corporations of all charitable, educational, penal or reformatory institutions under the patronage and control of the State, and all public officers when suing or defending in their official capacity for the benefit of the public, are the instruments of the State to carry out its powers for the public welfare, and in exercising their powers and enforcing public rights they act as agents, and may have extended to them the same exemptions in suits as belong to the State. Municipal bodies act for the State, and to the extent authorized exercise the powers of government, and when so exercising such powers they may, when so authorized, do so without conforming to all of the requirements imposed by the practice on natural, or artificial persons created for the purposes of business or gain. The construction contended for would compel the State itself to give bond on appeal, or the granting of a *supersedeas*, in cases where the suit was for the benefit of the State and public welfare. Such a purpose could never have actuated the persons who framed and adopted the Constitution.

But the question is not entirely new in this jurisdiction. In the case of *People v. Wallace*, 70 Ill. 680, it was insisted that an act which required, as a prerequisite to an appeal from a judgment for taxes, that the person desiring to appeal should deposit the amount of the judgment in money with the treasurer, was unconstitutional; but the validity of the act was upheld and enforced. Again, in the case of *Andrews v. Ramsey*, 75 Ill. 598, the validity of the same law was sustained. It was there said: "While the right of appeal from the final determination of County Courts is conferred by the Constitution, yet it can only be exercised under such conditions as may be imposed by the legislature. The language, 'Appeals and writs of error shall be allowed from the final determination of County Courts, as may be provided by law' (Const., § 19, art. 6), is too plain to admit of doubt that it is purely a question for the legislature to determine how and upon what terms such appeals shall be granted." It will be observed that case goes much further than we are required to go in this case. That law related to and regulated

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appeals in cases of judgments for taxes differently from private suits or other suits by the people; and inasmuch as it embraced a class coëxtensive with the State, the law was held to be general, and it was sustained, although persons against whom judgment for taxes had been rendered were compelled to submit to terms and conditions to procure an appeal in such cases as were not imposed on other persons in perfecting appeals in a different class of cases. Those cases are clearly conclusive of this question. The cases referred to by appellant do not announce the doctrine contended for by him. Were they under our Constitution, they by strained inference might be supposed to lend some support to the doctrine; but they are under different Constitutions, of the provisions of which we are not informed. We therefore presume they are correct, and required by their fundamental law; but if so, it does not follow that they apply to our organic law.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

PEOPLE V. TOWN OF BISHOP.

(111 Ill. 124.)

Election — two on same day — priority.

A township election was duly called, pursuant to statute, in June, 1870, on the question of a donation for railroad aid, and held on the 2d of July, 1870, and the donation was voted. On the same day a new Constitution and a separate article prohibiting municipal aid to railroads were submitted to the people, and adopted. The same judges and clerks conducted both elections, but separate ballot-boxes, poll-books and tally-lists were used. Both elections were opened and closed on the same time. The polls at general elections were required by law to be opened at 8 A. M., and closed at 6 P. M., unless the judges should decide to keep them open longer, not later than midnight. The schedule to the Constitution required the polls on the question of adoption to be kept open till sun-set. The polls in this instance were kept open till about sun-set. *Held*, that it could not be said that the donation was adopted prior to the adoption of the prohibitory article of the Constitution.

MANDAMUS. The opinion states the case. The writ was denied below.

Lyman Trumbull and John S. Cooper, for appellant.

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S. F. Gilmore, R. C. Hannah, John C. White and B. F. Kagay,
for appellee.

SCOTT, J. On the 10th of March, 1869, an act of the General Assembly of the State of Illinois, entitled "An act to incorporate the Springfield, Effingham and South-eastern Railroad Company," was approved and went into force and effect. In and by that act it was provided, among other things, that counties, townships, cities or incorporated towns, on or near the line of such railroad, might make subscriptions or donations to the capital stock of such company, if they chose to do so, in the manner provided in the act. The substance of the several sections in relation to subscriptions and donations is set forth in the petition so fully, that it appears what authority municipalities had to make either subscriptions or donations to the capital stock of the corporation, and what formalities should be observed in making the same. It is also set forth in the petition that after the act of March 10, 1869, went into force, and prior to the 2d of July, 1870, the railroad company, in accordance with the act of incorporation, had located its road through the counties of Jasper and Effingham, and through the town of Bishop, and that on the 2d of June, 1870, there was presented to the supervisors of the town of Bishop a petition, signed by twenty-five legal voters of the town, praying that an election be held in the township on the 2d day of July, 1870, to decide whether the township, under the provisions of the act of incorporation, would make a donation of its bonds to the company in the sum of \$10,000, payable in twenty years, with ten per cent interest per annum, payable annually, on the 2d of June in each year, which sum it was proposed to donate to the railroad company, and deliver to such company its bonds for such amount when its road should be built, and the cars running thereon, from the city of Effingham to the east line of Effingham county. It is also alleged the petition was in due form under the act and in conformity therewith, and that the acting supervisor of the town gave thirty days' notice of the time of holding such election, in conformity with prayer of said petition, and named the 2d day of July as the time of holding such election, and that the election would be held at the place provided for holding general elections in the township, and that on the 2d day of July, 1870, the election was held at the place and time specified in the notice, and that the same resulted as follows: for donation, forty-

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four votes; against donation, twenty-two votes. It is also alleged that under some judicial proceeding the claim or right of the railroad company to the donation alleged to have been voted by the township, was directed to be sold by the receiver before that time appointed by the court, to raise funds to aid in completing the road, and at the sale thereof Alfred P. Wright, for whose use the suit is brought, became the purchaser; and that in the month of August, 1883, the railroad having been built and the cars running thereon from the city of Effingham to Newton, in Jasper county, and beyond and over the entire road, Alfred P. Wright, for himself and in the name of the railroad company, being authorized so to do, caused a legal demand to be made on the supervisor and town clerk of the town of Bishop to have issued and delivered to the railroad company, or to Wright, the \$10,000 in bonds of the town with coupons attached, in accordance with the alleged vote. The supervisor and clerk of the town declined to issue the bonds, and the prayer of the petition is for a writ of *mandamus* to compel them to do so. The petition contains other matters, but it is not thought to be necessary to an understanding of the question discussed to state them. The defendants made a general denial of the allegations of the petition, and a stipulation was signed by the respective counsel, by which it was agreed that all questions as to the form of the pleadings should be waived, and that petitioner on the trial might introduce any competent evidence to support the allegations of the petition to make out a case, and that respondent might introduce any competent evidence under the general denial, and make all defenses thereunder as if the same were specially pleaded. The cause was submitted to the court on the pleadings and the evidence, and the court found the issues for defendants, and dismissed the petition. The relator brings the case to this court on appeal.

A number of defenses are insisted upon, but as there is one — if it is well taken — that is fatal to the relief sought, the discussion of all other questions is rendered unnecessary. It is, that the bonds claimed were not voted by the electors of the town sought to be coerced, prior to the adoption of that section of the Constitution of the State entitled “municipal subscriptions to railroads or private corporations,” which took effect July 2, 1870, and which forbids any county, city or township, or other municipal corporation, thereafter to become a subscriber to the capital stock of any railroad or

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private corporation, or to make donations to or loan its credit in aid of any such corporation.

It is conceded this separate article of the Constitution of 1870 took effect from and after its adoption, and that it was adopted on the 2d day of July, 1870, that being the day on which it with the body of the Constitution was submitted to the people for adoption or rejection. But a question arising on the record, and which is presented for decision, is whether an election which took place on the same day with the voting on the new Constitution was annulled by that fact. This exact question has not before arisen in this court, although cases have been determined, which if followed to their logical results must have an important bearing on the question to be decided. Previous decisions of this court have settled definitely that the separate article of the Constitution in relation to subscriptions and donations to the capital stock of railroads or other private corporations, took effect from and after its adoption, and that it was adopted on the 2d day of July, 1870, the day on which it, with the body of the Constitution, was submitted to the people for adoption or rejection. *Schall v. Bowman*, 62 Ill. 325; *Wright v. Bishop*, 88 Ill. 302; *Richards v. Donagho*, 66 Ill. 73. It is also settled by the previous decisions of this court, in accordance with the plain meaning of the Constitution, that there is now no authority, since the adoption of the present Constitution, in counties, cities, towns or other municipalities to make subscriptions to the capital stock of railroad companies, or to make donations to or lend their credit in aid of such corporations, and that the burden rests upon the party claiming the right to issue them, or to compel the issuing of such bonds, or asserting the validity of such bonds issued for such purposes since the adoption of the present Constitution, to show affirmatively that they were authorized by a vote of the municipality, under existing laws, prior to the adoption of the Constitution. *Jackson County v. Brush*, 77 Ill. 59; *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Wright v. Bishop*, *supra*. In *Wright v. Bishop*, it was held the clause of the Constitution containing the prohibition against municipal subscription or donation in the aid of railroad companies and other private corporations, took effect on the 2d of July, 1870, and that all such subscriptions or donations not authorized by a vote of the municipality prior to that time are void. Conceding, as may be done, the words "prior to that time," as used in the opinion of the court, simply mean prior to the adop-

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tion of the separate article of the Constitution, whenever that was, the inquiry arises, was the donation in this case voted by the municipality, under existing law prior to the adoption of this article of the Constitution on the 2d day of July, 1870? The burden of proving that fact, as has been seen, rests on the relator, and unless it has been shown affirmatively, the relief sought must be denied.

It becomes important then to inquire when was this article of the Constitution adopted, and from what time shall it be regarded as being in force? Counsel suggest, and with that view this court is inclined to concur, it seems clear this article was not and could not be adopted until after the polls closed at sun-down on the day of the election. This view finds support in the decision of this court in *Crook v. People*, 106 Ill. 237, where it was held the majority vote of the people "for city organization," was the adoption of the general law, and was a perfected act when the vote closed on that day, and that the city officers voted for under the old charter at the same election never became city officers. Nothing remained to be done, and the old charter was in fact repealed when the voting ceased on that day, and the persons voted for on the same day the general law was adopted, for city officers could not thereafter be qualified under a charter that had ceased to exist. In *Louisville v. Savings Bank*, 104 U. S. 469, it was held, on authority of the adjudged cases on that subject, that courts when substantial justice required it to be done, might ascertain the precise hour when a statute took effect, by the approval of the executive; and so in ascertaining when a constitutional provision was adopted, no reason was perceived why the court might not, in proper cases, inquire as to the hour when such approval became effective, as to the time when, by the closing of the polls, the people had adopted such provision. Adopting this view of the law, it may be held this separate article of the Constitution took effect at the close of the polls on the day of the election. It was the will of the people, as expressed by their vote throughout the State, which had the effect to adopt it, and it was an accomplished fact when all the votes had been cast. This is the most favorable view for the relator counsel can with any show of reason insist upon, and even under this construction it is not thought the donation in this case is saved. On the undisputed facts of this case can it be said the donation was voted, under existing laws, prior to the adoption of the separate article of the Constitution, regarding that as having taken place at the closing of the polls on the day

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of the election? Certainly not. The same construction must be applied to the donation as to the article of the Constitution — that is, that it was not voted until the votes were all cast. Which had priority then? — the adoption of the Constitution, or the vote for the donation? It is certainly not enough they were acts occurring at the precise same time. The donation must have been voted prior to the adoption of the Constitution to be valid. When two acts are done at the precise same instant of time, it cannot be said one occurred prior to the other. It does not appear from any thing in this record the donation was, in fact or in law, voted prior to the adoption of the Constitution. In order to entitle relator to relief, it was necessary he show affirmatively it was so done.

It will be noticed the election whether the town would make the donation was fixed to take place on the same day of the election for the adoption or the rejection of the Constitution by the people of the State. It was held on that day. The same judges and the same clerks conducted both elections, although two ballot boxes were used and separate poll books and tally lists were kept. Both elections were opened at the exact same time, and both were closed at the same time by one proclamation. The charter of the railroad company, under which the election to vote the donation was held, required the election should be conducted in the same manner and at the same places provided for holding elections in such township. The schedule to the new Constitution required the election to be conducted and return thereof made according to the laws then in force regulating general elections, except no registry of voters could be required, and the polls should be kept open for the reception of ballots until sunset of the day of the election. The laws regulating general elections then in force required the polls to be opened at eight o'clock in the forenoon, and provided they should be closed at six o'clock P. M., unless the judges should decide to keep the polls open to a later hour, which they might do not longer than midnight. The testimony of one of the clerks of the election is, the polls were kept open until about sundown, and that both elections were closed at the same time by one proclamation. It is evident the election for donation was not closed at six o'clock. The polls were kept open, as the judges had the right to do under the law, and were not in fact closed until about sundown, when the polls for the election on the adoption of the Constitution were closed. Whether any votes were cast after six o'clock in the after-

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noon does not appear. The witness does not recollect how that was. The voting was partly done in the forenoon and partly in the afternoon. The last voter whose name appears on the poll book was H. Coleman, or Colemyer, and the testimony is he voted at each election. That is evidence tending also to show both elections were kept open for the same time and were closed at the same hour. Of this fact there can scarcely be a doubt, and the hour at which the polls were closed was about sun-down.

Assuming then, as must be done, the polls for the donation were not closed at six o'clock, but at sun-down, what warrant is there for saying the vote of the donation was taken before the separate article of the Constitution was adopted? Certainly none. But the argument of counsel for the relator goes further, and as it is understood, assumes that as the schedule to the Constitution required the polls to be kept open for the reception of ballots on the question of the adoption of the Constitution, until sun-set of the day of the election, it will be presumed it was observed everywhere in the State; and even admitting the polls were not closed in the town of Bishop until sun-down, as there were voting places farther west in the State than in the town of Bishop, the polls must have been closed some minutes earlier at the latter place, so that the donation was in fact voted under existing laws before the voting had ceased at the westernmost voting places. Whether that is so, is uncertain; and if a fact, it is scarcely susceptible of being made certain by any proof attainable. It is certain no proof was offered, and the presumption it is insisted should be indulged in support of that view, is overcome by considerations entitled to great weight: First, there is no law that required the polls should be closed precisely at sun-set. It was only required the polls should be kept open until that time. *Non constat*, the polls were kept open in the town of Bishop as late as at any other point in the State. Of course the record contains nothing on that subject. Second, "sun-set," although a definite period of time at any given locality, yet what that time is can only be known from scientific calculations, which very few persons are capable of making. It is not precisely the same on any two days in succession, nor is it exactly the same at any two points distant apart in the State on the same day. It is known the sun sets later at a point west than one further east, and of this fact the court may take judicial notice. The exact difference of time however can only be obtained by a mathematical calculation. Certainly

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the framers of the schedule to the Constitution never expected the judges of election at the several voting places in the entire State would ascertain with mathematical precision the hour of "sun-set," that they might close the polls at that precise instant. It is believed the term "sun-set" was not used by the framers of that instrument in any accurate sense, to be determined by calculation. Evidently all that was meant was that the polls should be kept open until it should appear to be "sun-set," as that fact might be ascertained by the judges from observation, or from the best information attainable. Nor was it expected the judges at the several voting places throughout the State would observe the hour of "sun-set" with exact accuracy. The hour of "sun-set" on any given day, as it might appear to different persons, could hardly be expected to be accurately observed. Their judgment might vary many minutes. One person might conclude the sun had set, and another might not think so. It would be a mere matter of judgment, and uncertain at that, aided by the most accurate information ordinarily possessed. At most, the actual difference in time of "sun-set" at the voting place in the town of Bishop and at the westernmost place in the State would be but a few minutes, and is so slight as to be almost, if not entirely, inappreciable by common observation. It might be that the judges at the latter place would conclude it was "sun-set," and close the polls before the judges at the former place would conclude the hour for closing the polls had arrived, or before they deemed it necessary to close the polls.

Conceding then that the polls were closed in the town of Bishop at what the judge thought was "sun-set," there is no warrant for the proposition that was in fact earlier than the polls were closed at the westernmost voting place in the State, or elsewhere in the State. Whether the polls on the day of the election were, as a matter of fact, closed at an early or later time at one place than another point in the State, rests entirely on conjecture, and is too uncertain to base a judicial finding upon it. There is nothing in the record that shows or tends to show the donation insisted upon was voted prior to the adoption of the Constitution, assuming as it is thought may be done, it was adopted when the votes were all cast on the day of the election.

It is suggested the decision of the Supreme Court of the United States in *Louisville v. Savings Bank*, 104 U. S. 469, ought to have great weight in the decision of this case. Were the facts analogous,

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the authority of the case would be freely acknowledged as being entitled to great consideration. That case involved the legality of a vote taken on the 2d of July, 1870, to issue bonds for the payment of a donation that had been previously voted. The town meeting to determine whether bonds should be issued in lieu of a special tax, was appointed to be held at nine o'clock in the forenoon of the 2d of July, 1870, and it was so held. It was on that state of facts the court said: "The presumption may be therefore fairly indulged that the township had in fact voted for issuing bonds before the close of the general election on the same day the people of the State voted on the adoption of the particular section of the Constitution separately submitted, which relates to the municipal subscriptions to railroads and private corporations." But in the case being considered there can be no presumption indulged the electors of the town voted the donation before the close of the general election, for the evidence, to say the least of it, leaves that question in doubt, so that it cannot be fairly said it affirmatively appears the donation was voted before the adoption of the article of the Constitution separately submitted, which prohibits all subscriptions or donations to railroads or other private corporations.

[A minor point omitted.]

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

DAVIDSON v. REED.

(111 Ill 187.)

Burial — dedication — injunction against interference by dedicator.

One who has dedicated land to the public for burial purposes, the dedication having been accepted, may be prohibited from defacing or meddling with the graves thereon, at the suit of any one having relations or friends buried there.

BILL to restrain interference with a burial ground. The opinion states the case. The relief was granted below.

Clark & Clark, for plaintiff in error.

Craig & Craig, for defendant in error.

CRAIG, J. This was a bill in equity, brought to enjoin Daniel Davidson, the defendant, from defacing or meddling with certain graves in an alleged grave yard in Cumberland county, on land belonging to the defendant. The bill also prayed for a decree declaring that the burying ground had been dedicated to the public. Upon a hearing on the bill, answer, replication and evidence, the court rendered a decree as prayed for in the bill, and the defendant sued out this writ of error.

It is contended by the defendant that the evidence was not sufficient to establish the fact that the land in question had been dedicated to the public for a burying ground. What shall constitute a dedication of land to the public has been considered and determined by this court in several cases. In *Marcy v. Taylor*, 19 Ill. 635, it was held that dedication of a highway may be proven in various ways — by grant, by user, or by the acts and declarations of the owner — and that no particular time is necessary for evidence of dedication, but to be availing there must be an intent to dedicate. In *Rees v. City of Chicago*, 38 Ill. 327, it was also held that a dedication is to be proved not alone by a deed but by matter *in pais*, consisting of the acts and accompanying declarations of the owners of the land alleged to be dedicated. Such acts, coupled with evidence of acceptance by the public, may make a case of dedication. In *City of Cincinnati v. White's Lessee*, 6 Pet. 431, it is declared that no particular form or ceremony is necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. In *Hanter v. Trustees of Sandy Hill*, 6 Hill, 407, it was held that “dedication * * * is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner.” It was also held that lands may be dedicated to persons and charitable purposes, as well as for public ways, commons and other easements in the nature of ways, so as to conclude the owner who makes the dedication. In *Godfrey v. City of Alton*, 12 Ill. 29; s. c., 52 Am. Dec. 476, in the discussion of the question of dedication, it was held that the statute of frauds does not apply to the dedication of ground to the public. A dedication may be made by grant or written instrument. It may be evidenced by acts and declarations without writing. No particular form is required to establish its validity, it being a question of intention.

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. Tested by the principles announced in the authorities cited, it only remains to be seen whether the evidence authorized the decree that the land in question had been dedicated to the public, to be used as a place for the burial of the dead.

James McKnight originally owned the south-west quarter of section 21, township 10, north, range 10, east, in Cumberland county. The burying ground is located near the south-east corner of the land. As early as 1844 McKnight buried a child on the land in question, and since that time it has been known as the "McKnight graveyard," and has been used by the neighborhood as a burying-ground. While McKnight owned the land he buried a wife and two children there. Reed testified that McKnight told him "he expected the neighbors would want to bury there, as we had commenced it." He also testified that he and McKnight talked of staking off and fencing the ground, but they neglected to do it. McKnight sold the land to Rhodes, and while Rhodes owned the land the dead were buried there as before. He sold to Scott, and Scott to Collins, and Collins sold to the defendant. Collins, while he owned the land, buried a child in the grave yard. Indeed from 1844 the land in question has been known, used and recognized by the different owners and the public as a public burying ground. While Collins owned the land he said, if the people in the neighborhood would clear and fence it, he would give them a half acre. Rhodes also, as he testified, offered to give the grave yard if the people would fence it. It was also proven that the defendant offered to give the land occupied by the graves if the people would fence it.

The only conclusion to be reached from all the evidence is, that McKnight, when he owned the land, established a graveyard, and intended to dedicate to the public the particular tract in question, to be used as a place for the burial of the dead. It is true that when he sold the land no reservation was made in the deed, but the subsequent purchasers all had notice of the existence of the burying ground, and purchased subject to the rights the public had acquired in and to the property. In the case of *City of Cincinnati v. White's Lessee, supra*, it is said that all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. The assent of the owner, McKnight, that the land should be appropriated for the burial of the dead, is clear and manifest. That the public

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accepted and used the land for the public purpose for which it was designated by the owner is also beyond dispute.

It has been suggested that the bill cannot be maintained in the names of the two complainants. The complainants were residents of the neighborhood. They had friends buried in the burying ground, and were thus interested in preserving, for themselves and the public, the burying ground as it had been established, and we are of opinion that they had the right to sue in behalf of themselves and others having a like interest. *Beatty v. Kintz*, 2 Pet. 585. The bill was brought, and in our judgment properly, for the protection of the rights of the people in that particular locality, and we perceive no reason why it may not be maintained in the names of a part for the benefit of all, as well as if all directly interested had joined in the bill.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

ABEND V. TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

(111 Ill. 203.)

Master and servant — contributory negligence — fellow servants.

An employee of a railway company was sent on a wrecking train in charge of one person as engineer and conductor. In violation of the rule of the company he rode on the engine. By the negligence of the engineer an accident occurred by which he was killed, in consequence of his position on the engine. Held (1) that he was guilty of contributory negligence; * (2) that he and the engineer and conductor were fellow-servants, and no action would lie. (*See note, p. 621.*)

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

Jas. M. Dill, W. H. Burnett and J. M. Freels, for plaintiff in error.

John B. Bowman, for defendant in error.

MULKBY, J. This action was brought by Edward Abend, the plaintiff in error, as administrator of Thomas Beasley, against the

* See *Ky. Cent. R. Co. v. Thomas' Admr.* (79 Ky. 160), 42 Am. Rep. 203.

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Terre Haute and Indianapolis Railroad Company, the defendant in error, to recover damages for personal injuries received by the plaintiff's intestate in a railroad collision, resulting in the latter's death, alleged to have been occasioned by the negligence of the company. The cause was tried in the St. Clair Circuit Court, where the action was brought, resulting in a verdict and judgment for the defendant. The judgment having been affirmed by the Appellate Court for the Fourth District, the plaintiff in error brings the record here for review.

On the trial in the Circuit Court, after the evidence on the part of the plaintiff was in, the defendant declined to offer any testimony, and the court, at its instance, instructed the jury to find the issues for the defendant, which it did, and the ruling of the court in thus withdrawing the case from the jury presents the ultimate question for determination.

The circumstances under which Beasley was killed, and which gave rise to the present litigation, are as follows: On the 25th of June, 1880, one of the defendant's trains was wrecked on its road, near Confidence Hill, in Madison county, this State. On the following day the deceased, being an employee of the company, together with a number of others, was ordered by the proper officer of the company to go out from East St. Louis, on a wrecking train of the defendant, to the place of collision, for the purpose of assisting in removing the wreck, which he proceeded to do. The train was under the control of one Busse, who acted in the capacity both of conductor and engineer. Beasley, instead of taking a seat in the wrecking car, as he should have done, in violation of a published rule of the company of many years' standing, and of which, from the circumstances, he must have had notice, got on the locomotive and took a seat on the fireman's side, immediately in front of Cope, the fireman, the train moving off as he did so, in which position he remained until a short time afterward, when the locomotive upon which he was riding collided with the engine of a freight train coming in the opposite direction, causing his immediate death. The train upon which the deceased was riding was what is known, particularly among railroad men, as a "wild train," that is, a train not running by schedule, but under special instructions. By the orders delivered to Busse he was expressly directed to keep out of the way of the very train with which his own train collided. This he neglected to do, hence the collision, and the serious consequences resulting therefrom.

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The declaration charges, in substance, that Beasley, by order of the company, went aboard the train for the purpose indicated, and that while it was proceeding to the wreck, under the control and management of the servants of the defendant, it came in collision with a freight train belonging to and under the control of the defendant, whereby the said Beasley was instantly killed; that at the time he was so killed he was exercising due care and caution, and that such killing was without any fault or misconduct on his part, and that he was not, at the time in question, a fellow-servant with the servants of the defendant who were operating said train, or either of them; that said Beasley then was, and prior thereto had been, in the employ of the defendant as its head blacksmith, and when so killed he was proceeding to said wreck, by defendant's order, in his capacity as such blacksmith, which is a distinct and different line of employment from that of the other servants of the defendant, etc. These allegations were all traversed by the defendant's plea, and thereby put directly in issue.

The proofs clearly establish most of the issuable facts essential to a recovery. But do they show, or tend to show, the deceased was exercising due care at the time of the collision, or that the deceased was not at such time a fellow servant with the servants of the company through whose negligence the collision happened? We are of opinion they do not. It follows therefore the trial court ruled properly in withdrawing the case from the jury. What evidence is there in this case tending to show that the deceased was using due care at the time of the accident? None, that we can see. Instead of taking a seat in the wrecking car (the safest and most appropriate place, especially in case of collision or other accident), as he should have done, and indeed as he was requested to do, he deliberately, in violation of an express rule of the company, took a seat upon the locomotive, where he was not only exposed to the ordinary dangers incident to that place, but his position even there was rendered extra hazardous by the fireman sitting immediately in his rear, in the small space provided for the fireman only. Situated as the parties were, in case of sudden danger it would, to say the least of it, have been very difficult for him to have made his escape by jumping from the engine, and so it turned out in this instance. Cope, being in the rear, did jump from the locomotive before the collision — Beasley did not. The consequence was, Cope saved his life, while Beasley lost his. Of the entire force, Beasley was the only one killed.

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We are of opinion the proofs, so far from showing the deceased was exercising due care when the accident occurred, established beyond controversy he was guilty of such negligence as to absolutely forbid a recovery. Indeed it does not seem to be seriously contended the deceased was free from negligence, but the contention appears to be that Beasley's death was the immediate result of the collision, and that the negligence of the deceased was not an element or factor in producing the collision, hence it seems to be concluded that however gross his negligence, it cannot affect his right of recovery. This view, plausible as it may appear, is clearly unsound. It cannot be maintained as a general proposition, that in actions for personal injuries, caused by the defendant's negligence, the contributory negligence of the injured party will constitute no defense except when the latter's negligence is an element or factor in producing the force causing the injury complained of. It is sufficient if the plaintiff's negligence materially contributes to the injury, whether it contributes to the force, causing the injury or not. Whatever *dicta*, or even decisions may be found to the contrary, the cases fully establish the rule as here stated. *Galena & Chicago Union R. Co. v. Fay*, 16 Ill. 558; s. c., 63 Am. Dec. 323; *Illinois Central R. Co. v. Buckner*, 28 Ill. 299; *Chicago & Alton R. Co. v. Becker*, 76 Ill. 25.

A simple illustration will demonstrate the fallacy of the principle contended for. A party deliberately lies down upon a railroad track where trains of a railroad company are continually passing, and falls asleep. Presently a train comes along at a forbidden rate of speed, and the engineer neglects to ring the bell as required by statute, and the party on the track is injured. In the case supposed it is clear there could be no recovery, and yet the negligence of the party injured did not contribute to the force causing the injury, nor did it have any connection with the negligence of the company in operating its train. It consisted simply, as in the present case, in the injured party placing himself in a dangerous position, but for which the accident would not have happened. The principle deducible from the cases generally is that if the plaintiff, by the exercise of ordinary care and prudence, could have avoided the consequences of the defendant's negligence, and fails to do so, he cannot recover. Indeed it is a fundamental principle the plaintiff cannot recover in any case for an injury occasioned by negligence merely, which would have been avoided by the exercise

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of ordinary care and prudence on the part of the plaintiff himself. Of course, the rule here announced has no application where the element of fraud or intentional injury enters into the case, for however negligent the plaintiff may be, the defendant has no right to practice a fraud upon or willfully injure him.

But conceding, for the purposes of the argument, the court should not have withdrawn the question of due care of the plaintiff from the jury, we have no hesitancy in saying the case made by the plaintiff was wholly insufficient to warrant a recovery upon the other question, and the case was therefore properly withdrawn from the jury on that ground. The *Cox* case, 21 Ill. 23, the *Keefe* case, 47 Ill. 108, the *Britz* case, 72 Ill. 256, and the *Durkin* case, 76 Ill. 295, all fully sustain the ruling of the court below upon this question. The evidence, construed in the light of these cases, shows beyond all controversy that Beasley was a fellow-servant of Busse, through whose negligence and disobedience of orders the collision was brought about. The evidence shows that a wrecking force is always made up, in the hurry of the moment, out of the employees and servants of the company who happen to be within convenient reach, without regard to the particular line of service in which they are employed. The removing of obstructions from the tracks in case of a collision is, as shown by the proofs in this case, a distinct branch of service, to which all the laboring force of the company are liable to be called, without any reference to their ordinary calling or duties; and when a force thus made up goes aboard the wrecking train and starts to the scene of disaster, they are all, including conductor, engineer, fireman and brakeman, just as much in a common branch of service while on the way, as they are after their arrival and the work of clearing the tracks has actually commenced. It is an error to suppose that a force of men cannot be engaged in a common service unless all are continuously working at the same time and engaged doing precisely the same kind of work. It is sufficient if all are actually employed by the same master, and that the work of each, whatever it may be, has for its immediate object a common end and purpose, sought to be accomplished by the united efforts of all. The skill of a carpenter, blacksmith or other mechanic, might be very useful in removing a wreck, and when thus working together in such a service, though each one in his own particular way, they are all, within the meaning of the rule, engaged in a common employment, notwithstanding in their ordinary employment they

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have no connection with each other, and consequently when so engaged are not fellow servants. The deceased, though not actually using a hammer or other tool at the very moment he was killed, was nevertheless just as clearly in the employ of the company for the purposes of the business then in hand as the remainder of the force who actually assisted in removing the wreck. One who is hired by the day, week or year, is just as much in his employers' service in going to and from his work as when actually engaged in the work itself.

The judgment will be affirmed.

Judgment affirmed.

SCOTT and DICKEY, JJ., dissent.

NOTE BY THE REPORTER.—In *L. & N. R. Co. v. Moore*, Kentucky Court of Appeals, March 6, 1886, it was held that a conductor and a brakeman are not fellow servants. The court said: "It was once the English rule that it did not matter if the injured servant was subordinate to the neglectful one and under his control, or if they were engaged in different grades and departments of the service. To hold the master responsible he must have had some personal connection with the injury, provided of course that he was not neglectful in the selection and retention of his servants. This rule in that country seems yet to prevail, as well as in many courts of this country, save that if the injured party be in a different grade of the service from the neglectful one, then the employer may be made responsible. The establishment of this rule in many of our States is largely due to the influence of the opinion of Chief Justice SHAW in the case of *Farwell v. Railroad Co.*, 4 Metc. 49. The courts of Ohio and this State have however extended this rule, and the leaning in New York is in the same direction; and they hold not only that the master is liable for an injury to one servant by the neglect of another if they are engaged in different grades of the employment, but that he is also liable, although they may be engaged in the same common employment, provided the neglectful one is superior to or in control of the injured one. *Railroad Co. v. Stevens*, 20 Ohio St. 415; *Same v. Keary*, 8 Ohio St. 201; *Malone v. Hathaway*, 64 N. Y. 5; *Railroad Co. v. Collins*, 2 Duvall, 114; *Same v. Cavens' Adm'r*, 9 Bush, 559. The rule as thus laid down is, to our mind, the proper one, and consistent with public policy. The Supreme Court of the United States in the case of the *C. & M. & St. P. Railroad v. Ross*, 112 U. S. 877, after ably reviewing both the English and American cases, has adopted the Ohio and Kentucky rule as the correct one."

A railroad car-inspector and a car-coupler are not fellow servants. See *Tierney v. Minn., etc., R. Co.*, 811 ante, 85, and note 45. In *Howard v. Denver & R. G. Ry. Co.*, Cir. Ct., Dist. Col., March 23, 1886, 26 Fed. Rep. 837, it was held that a fireman on a passenger train and an engineer in charge of an engine not connected with such train, but belonging to the same railroad company, are fellow servants. In *Phillips v. Chic., etc., R. Co.*, Iowa Supreme Court, December 1, 1885, it was held that a general messenger and train dispatcher and a head brakeman are not fellow servants.

Chicago and Alton Railroad Company v. Goodwin.

CHICAGO AND ALTON RAILROAD COMPANY V. GOODWIN.

(111 Ill. 203.)

Features — railway embankment built by consent of life-tenant.

A railway company, by license of the life-tenant, entered upon land and constructed its road, and used it without objection during his life. On his death, on condemnation proceedings, *held*, that the company was not liable to pay for the structures it had so placed on the land, as they did not become the property of the owner in fee.

CONDEMNATION proceedings. The head-note shows the case. The plaintiff had judgment below.

Edward C. Akin, for appellant.

G. D. A. Parks, for appellee.

DICKER, J. We think that the instructions given do not properly state the law applicable to the facts of this case. William Goodwin, as tenant for life of this land, might make or allow any use of it he saw fit, during his life, provided no injury was done to the inheritance. Appellees, as remainder-men, during the existence of the life estate had the right only to prevent the commission of waste. The evidence showing that the railroad track, as originally constructed, did no injury to the premises, appellees had no lawful power to prevent the construction of the road under the license of the tenant for life. The original entry, as to them, could not have been a trespass, for the reason they then had not even a right to possession. As has been said: "An original entry by the consent of the tenant for life is lawful, and will not subject the party entering to an action of ejectment on the part of the remainderman although damages have not been paid. Other remedies must be sought." *Mills Em. Domain*, § 142; *Austin v. Rutland R. Co.*, 45 Vt. 142.

By instruction No. 2, the jury are told that if the entry upon the land was made without any license from the defendants, or from one having legal power and authority to give such license or permission, such entry, etc., was a trespass, and that the structures placed upon the land became a part of the realty, and inseparable from it. By instruction No. 4, the jury were told that the life-

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tenant had no power or authority to give such license. These instructions should not have been given in a case like the present. It does not necessarily and invariably follow that structures, or even buildings, placed by one person on the land of another become a part of the real estate. When they are trade fixtures, they are regarded as personal property. So a house erected upon the land of another, under an agreement that it shall belong to the builder, is personal property. *Matzon v. Griffin*, 78 Ill. 477; *Curtiss v. Hoyt*, 19 Conn. 165; *Wells v. Bannister*, 4 Mass. 514; 2 Am. L. Cas. 747. If a man erects a house upon the land of another with his consent, it will, if the builder has no title to the land, be the personal property of the builder. 1 Washb. Real Prop., p. 2, § 4; *Aldrich v. Parsons*, 6 N. H. 555; *Dame v. Dame*, 38 N. H. 439; *Osgood v. Howard*, 6 Greenl. 452; *Ashmun v. Williams*, 8 Pick. 462; *Doty v. Gorham*, 5 Pick. 487; s. c., 16 Am. Dec. 417; *Rogers v. Woodbury*, 15 Pick. 156; *Mott v. Palmer*, 1 Conn. 571; *Hinckley v. Baxter*, 13 Allen, 139. And it will so remain, though the land-owner convey the land, and the owner of the building convey that, if to different persons. *Ham v. Kendall*, 111 Mass. 297.

If a person enters the land of another without permission, and places a building or other structure thereon, permanently attached to the soil, he will be a trespasser, and the building or structure will become part and parcel of the land, and will be the property of the land-owner. In such case the builder acquires no rights by his tortious acts. But here there was no trespass, because the entry upon the land was with the express consent of one having the right to give it, and all the subsequent acts were done without objection, and before any steps were taken to dispossess the plaintiff or the corporation which it succeeded. Even if the entry had been without license or permission of any one authorized to grant the same, so that it was a trespass at the time, the law would not require the railroad company in seeking a condemnation of the land so entered upon for a right of way, to pay the owner of the land for structures placed upon it at its own expense, with a view of subsequently acquiring the right of way. As sustaining these views see *Greve v. First Division St. Paul & Pac. R. Co.*, 26 Minn. 66; *Morgan's Appeal*, 39 Mich. 675; *Toledo, Ann Arbor & Grand Trunk R. Co. v. Dunlap*, 47 Mich. 456; *Lyon v. Green Bay Ry. Co.*, 42 Wis. 538; *Justice v. Nesquehoning Valley R. Co.*, 87 Penn. St. 28; *California P. R. Co. v. Armstrong*, 46 Cal. 85.

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In a proceeding of this kind to condemn land for a right of way, the land-owner cannot recover damages for a prior trespass by entering upon his premises. *Lafayette, Bloomington & Mississippi R. Co. v. Winslow*, 66 Ill. 219. .

That the land owner whose land is condemned cannot recover, in addition to the value of the land taken, the value of improvements put upon the same by the party seeking a condemnation, reference has been made to the following other cases: *Baker v. Chicago, Rock Island and Pacific R. Co.*, 57 Mo. 265; *Dietrich v. Murdock*, 42 Mo. 279; *Blesch v. Chicago R. Co.*, 43 Wis. 195; *Mississippi R. Co. v. Devaney*, 42 Miss. 602; *Robbins v. Milwaukee R. Co.*, 60 Me. 290; *Sema R. and D. R. Co. v. Camp*, 45 Ga. 108; *Harvey v. Lackawanna & B. R. Co.*, 47 Penn. St. 428; *East Pennsylvania R. Co. v. Hottenstine*, 47 Penn. St. 28; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Greenville R. Co. v. Munnamaker*, 4 Rich. L. 107; *McAuley v. Western Vt. R. Co.*, 33 Vt. 311; *State v. Gulf Ry. Co.*, 3 Rob. (La.) 513. The "just compensation" required to be given is for that which is taken from the owner, and which is of value to him, and not for something he never owned.

The third instruction given for the defendants is further erroneous in directing the jury to allow the defendants, as compensation for the structures placed upon the land, what such property was reasonably worth for the purpose for which it was intended, although of no practical value to defendants in connection with their farm. The compensation which the law requires to be made is that which is "just." This means that the sum allowed and paid the owner whose property is taken shall be equivalent to the value of that of which he has been deprived. It would be unjust to allow him more than will compensate his loss. It would seem at first blush, to be highly inequitable to allow him for a railroad track over his land, not built by him, including embankments, at its cost or value to a railway company owning a franchise to use the same for railroad purposes, when to him it is of no practical value.

For the reasons indicated, the judgment of the County Court of Will county is reversed, and the cause remanded for further proceedings according to law.

Judgment reversed.

Launder v. City of Chicago.

LAUNDER V. CITY OF CHICAGO.

(111 Ill. 201.)

Municipal corporation — ordinance — as to pawnbrokers — reasonableness.

A city ordinance requiring every licensed pawnbroker to make out and deliver to the superintendent of police, every day, before noon, a legible and correct copy from a book to be kept by him, of all things received on deposit or purchased during the preceding day, together with the hour when received or purchased, and a description of the pledgor or seller is not unreasonable.*

SUIT for penalty for violation of ordinance. The head-note shows the case. The plaintiff had judgment below.

Monroe & Luddy, for appellant.

M. R. M. Wallace, for appellee.

DICKEY, J. The decision in this case depends upon the validity of section 1713 of the revised ordinances of the city, relating to pawnbrokers. That ordinance is claimed to be unreasonable, unjust and oppressive, and without authority of law.

The first inquiry is, whether the legislature has conferred the power on the city council to pass the ordinance. The legislature has given the city council in cities, and the president and trustees in villages, the power "to license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, * * * and to revoke such license at pleasure." Rev. Stat., chap. 24, § 62, sub. 41. Under this grant of power it is a matter purely discretionary with the city authorities whether they will license and regulate the business of pawnbrokers, or wholly prohibit and suppress business by them within the city. In such case, if the city grants a license, it may impose such conditions and burdens as it may see fit. This latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on such terms as the city may choose. *Schwuchow v. City of Chicago*, 68 Ill. 444; *Wiggins v. City of Chicago*, 68 Ill. 373.

The case of *City of Clinton v. Phillips*, 58 Ill. 102; s. c., 11 Am. Rep. 52, is referred to as an authority to show the ordinance before us is invalid, for want of power to enact it. The city of Clinton

* See note 85 Am. Rep. 372.

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had no power given it to regulate, suppress or prohibit the sale of liquors, for certain specified purposes, by druggists. The charter of that city, under which its ordinance was passed, is as follows: "To restrain, prohibit and suppress tippling houses, dram-shops, gambling houses, bawdy houses and disorderly houses" (1 Private Laws, 1867, 779), and not druggists. If that city had conferred upon it the power to license, tax, regulate, suppress and prohibit druggists, etc., then the decision referred to would have been in point here. As it is, the ruling in that case is to be applied to cases where only the same rights and powers are conferred, and it cannot be invoked to show that the legislature may not give the power to pass the very ordinance there held invalid. In this case without a license the appellant had no right to engage in the business of a pawnbroker within the city. He sought for and obtained the city's license to transact such business, and took the privilege his license conferred, subject to the restrictions and burdens imposed by the ordinance under which alone it could issue. This was an unmistakable recognition and admission of the validity and binding force of the ordinance. By taking such license he secured immunity from prosecution for engaging in his vocation, if he conformed to the terms on which it was given him. The ordinance certainly did not invade any right of property or other right, but it conferred a right. Appellant having profited by taking a license, with full knowledge of the conditions imposed, cannot refuse to carry out such conditions.

We do not regard the ordinance as being "unjust, unreasonable, tyrannical and oppressive." The requirements objected to are but reasonable means to keep the pawnbrokers' business free from great abuse by thieves disposing of stolen goods in their shops. They are all made in the interest of the public, and are intended for the detection and prevention of crime. The ordinance is not tyrannical and oppressive, as the appellant was not bound to bring himself within its provisions. Before taking out license, appellant knew he had to keep a book containing an account and description of goods pawned, amount of money loaned thereon, the time of pledge, rate of interest, and the names of pledgors, and that such book must be kept open for the inspection of the mayor and any member of the police, and no objection seems to have been urged to these requirements, and it appears that appellant has always complied with them. If the city council had the power to pass

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section 1708, no good reason is perceived why it could not pass section 1713.

Appellant makes the point that this last section makes him guilty of a penal offense for not making a public disclosure of the business already done by him. We do not regard this section as requiring a public disclosure of the appellant's business. Giving the required information to the chief of police, a public officer of the law, does not give publicity to his business, at least not so much as keeping his books open to the inspection of the mayor and any member of the police. It is not to be presumed that the chief of police will make an improper use of the information he receives under this section. On the contrary, it would be a breach of official duty for him to do so, or to make his information public except when necessary in the detection and punishment of crime.

But it is sufficient to say that we regard the ordinance in question as but a reasonable and proper exercise of the police power of the State, and as aimed at the detection and prevention of crime. It is well known that in our great cities thieves and the receivers of stolen property often dispose of the fruits of their crime by sale to second-hand dealers, or by pledge or sale to pawnbrokers, who may be perfectly free from any intention or disposition to aid such criminals. Such an ordinance also has a tendency to protect even such dealers and brokers from imposition and loss.

The evidence as to the probable effect of complying with the ordinance, on the business of the appellant, was properly excluded. The reasonableness and legality of an ordinance do not depend upon the testimony of witnesses as to its possible or probable effect.

Perceiving no error in the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Black v. Wabash, St. Louis and Pacific Railway Company.

BLACK V. WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

(111 Ill. 351.)

Carrier — contract limiting liability — fraud to induce signing.

While a contract of carriage limiting the carrier's liability in consideration of reduced rates of freight is valid, and a shipper intelligently, deliberately and without artifice signing such a contract is bound by it, yet he may show in avoidance that he was purposely misled by the carrier's agent, and induced to sign without time for examination, under the false assurance that it was a pass.

ACTION for delay in transportation of cattle. The opinion states the case. The defendant had judgment below.

Moore & Warner, for appellant.

Brown & Kirby, for appellee.

MULKEY, J. This was an action on the case brought by the appellant, Robert Black, to the June term, 1882, of the DeWitt Circuit Court, against the Wabash, St. Louis and Pacific Railway Company, the appellee, to recover damages for alleged negligence in the carriage and transportation of a lot of beef cattle belonging to the appellant, from Midland City, in said DeWitt county, to the Union Stock Yards, in Cook county, resulting as is claimed in the loss of several head of the cattle, and serious injury to the others. The cause was tried before a court and a jury, resulting in a verdict and judgment for the defendant. On appeal to the Appellate Court for the Third District the judgment of the Circuit Court was affirmed, and the case is now before us for review.

The errors assigned upon the record, and relied on for a reversal, question the rulings of the trial court in the admission and exclusion of testimony, and in the giving, refusing and modifying of instructions. In order to a proper understanding of the questions thus raised, it will be necessary to advert, in a general way, to the leading facts in the case, as well as to the opposing theories upon which the case was tried.

The appellant being a farmer and shipper of stock, in the latter part of June, 1881, called on Cicero Lane, the station agent of appellee at Midland City, for the purpose of making arrangements

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for shipping a lot of cattle and hogs from that place to Chicago over appellee's road. The agent informed him that at present rates the cars would cost him \$33.50 per car (or as appellant states it, \$30 per car), but at the same time promised him he would try to get him better rates. Accordingly on the 1st of July, or thereabouts, the agent informed him the company had made a lower rate, and that he could then ship his stock at \$25 per car. In pursuance of this understanding, the appellant on the 6th day of the following month, loaded his stock, consisting of ninety-four head of cattle and fifty-five head of hogs, in cars furnished by appellee, then standing on its tracks at Midland City. After the stock was loaded and a short time before the train moved off, Lane, the station agent, came to appellant and told him he had better go to the office and sign his passes, which he did. The passes referred to were in fact a written agreement in duplicate, between the company and appellant, containing the terms and conditions upon which the stock then in the cars was to be shipped, the same having already been signed by Lane on behalf of the company. Appellant testifies this agreement was signed by him in duplicate, on presentation by the agent, without any knowledge of the real character of its contents, and the evidence shows one copy of it was retained by appellant and the other forwarded by Lane to the general freight agent of the company at St. Louis. As appellant claims, on the arrival of the train at Chicago, and before he had an opportunity of examining the contract, an agent of the company came round and took it up, and has since had exclusive possession of it.

The ultimate question upon which the case hinges is, whether appellant under the circumstances is concluded by the provisions of the act in question. The appellant, in presenting the case to the trial court, simply showed the time and place of the shipment of the stock, and the price to be paid for the cars used for that purpose, without developing the existence of the special contract. He then offered testimony tending to show the loss and injury to the cattle were occasioned by the negligence and delay of the company in their transportation, and thereupon rested. To meet the case thus made by appellant, appellee offered testimony tending to negative the charge of negligence on the part of the company, and also put in evidence the special contract above mentioned, which contains, among others, the following stipulation:

"Tenth. In consideration of the rate aforesaid, it is further

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agreed that no claim for damages which may accrue to the party of the second part under this contract, shall be allowed or paid by the party of the first part or sued for in any court by the party of the second part, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the party of the second part, or his or their agent, and delivered to the general freight agent of the party of the first part, at his office in the city of St. Louis, within five (5) days from the time said stock is removed from said cars."

It is conceded appellant failed to give notice to appellee's general freight agent at the city of St. Louis of the loss and damage to the stock, within the time or in the manner required by the above stipulation. It is claimed however by appellant, first, that the stipulation in question is an unreasonable attempt on the part of the company to limit its common-law liability, not warranted by public policy, and that for that reason it is inoperative and void; and second, that admitting it to be *prima facie* valid, it is nevertheless, by reason of the circumstances under which it was obtained, not binding upon the appellant.

With respect to the first branch of the proposition we have no hesitancy in holding that a stipulation like this, when voluntarily and understandingly entered into by the shipper, is binding upon him. The manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence, to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants. We see nothing improper in requiring such claims to be verified by affidavit.

The second branch of the proposition is not so free from difficulty. A contract, *ex vi termini*, implies the assent of two or more minds to the same proposition. It follows therefore if one sign a written instrument containing mutual stipulations between himself and another, without any knowledge of its contents, there will not be in fact, in the strict sense of the term, a contract between them, though in a legal sense there may be. Where a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound, for in such case the law

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will not permit him to allege, as matter of defense, his ignorance of that which it was his duty to know, particularly where the means of information are within his immediate reach and he neglects to avail himself of them. Applying this elementary principle to the case in hand, it was clearly the duty of appellant to have examined the contract in question, and fully advised himself as to its contents, before signing it; and if by a failure to perform this duty, he has sustained an injury, he must suffer the consequences, unless such failure was occasioned by the fraud or artifice of appellee,—and this, we understand, appellant claims was the case.

Whether appellant was purposely misled and thrown off his guard by appellee, and thereby induced to sign the contract in question, upon the hypothesis it was a mere pass over appellee's road, as is claimed was the case by appellant's counsel, is a question which the trial court seems to have ignored and studiously kept from the consideration of the jury. This is clearly shown, both from the instructions of the court and its exclusion of testimony bearing upon the question. Indeed the rulings of the trial court seem to have been highly technical, and altogether unfavorable to the appellant. Even upon cross-examination, where great latitude is generally allowed, the reins appear to have been very tightly drawn, as is shown by the following rulings: The station agent having been permitted to state, against the objection of appellant, that \$33.50 was the schedule rate per car for the shipment of stock from Midland City to Chicago, at the date of this transaction, was asked, on cross-examination, if the company had ever received that amount for a car of freight from Midland City to Chicago, and on objection, the question, strange to say, was ruled improper. The following cross-question propounded to this witness was also ruled improper: "Did you tell him (appellant) when he came for them (the cars) at \$25, he would have to sign any contract releasing the company from liability?" Both the above questions, under the latitude of cross-examination, were clearly proper, and the court erred in ruling otherwise. The erroneous ruling of the court however so far as the last two questions are concerned, is cured by the answers of the witness, for notwithstanding they were ruled improper, the witness proceeded to and did fully answer them, so that the appellant was not at all prejudiced by the ruling.

With respect to the signing of the contract, the station agent testified as follows: "I don't know whether the cattle were all loaded or

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not when the contract was signed. I don't remember when the train started. I went up to the pens and told him to sign the contract, and that would pass him. I can't say positive whether I told him to come down and sign his passes. I don't remember that I called it a contract when I asked him to sign it. When Black came down to sign it, the cars were loaded, as well as I recollect." Having made this statement, the witness was then asked, on cross-examination, the following question: "Did you tell Black what it was when you had him sign it?" which on objection, was held by the court improper, and the plaintiff excepted. As the witness had stated, on his examination in chief, certain declarations of his own, made at the time, and relating to the signing of the alleged contract, it was clearly the right of appellant, on cross-examination, to call out all that was said at the same time on the same subject. Under the circumstances of this case, everything that was said or done at the time by either of the parties, relating to the signing of the contract, was a part of the *res gestæ*, and was proper to be called out on cross-examination, and it was therefore clearly error to disallow the question.

The appellant having been called as a witness, in rebuttal, to give his version of what occurred before and at the time of signing the contract in question, was asked the following question, namely: "What, if any thing was said about that being a special contract with you at that time?" "Was this paper (introduced in evidence) the contract you made to ship the stock by the Wabash Railroad Company to Chicago?" both of which questions the court held improper, and refused to allow them to be answered. Upon what principle the court permitted the agent of appellee to testify as to all the matters here inquired after, and yet absolutely closed the mouth of appellant on the same subject, it is difficult to conceive. For instance, when Lane was on the stand, counsel for appellee, referring to the written contract relied on as a defense in the case, asked the witness this question: "Was this the contract on which the cattle were shipped?" and the court, on objection being made, held the question, as it should have done, proper; yet when appellant is asked substantially the same question, he was not, as we have just seen, permitted to answer it. We are aware of no rule of law that permits such a diversity of ruling in the same case.

It may be, the court, in so studiously and vigilantly suppressing and keeping from the jury all that was attempted to be shown by

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appellant as to what was said or passed between the parties either before or at the time of signing the agreement, supposed it was merely applying the general principle that parol evidence is not admissible for the purpose of changing the terms of a written instrument; but if so, the court was clearly laboring under a misapprehension. The object of the excluded evidence was not to change the terms of an agreement which was admitted to have a valid existence, but rather to show that by reason of the circumstances under which it was obtained, it was, in legal effect, no agreement at all. It is just as well settled by the authorities that parol evidence is admissible to impeach the validity of an instrument, as it is that such evidence will not be heard merely for the purpose of changing or varying its terms. Abb. Trial Ev. 294; Kerr Fraud and Mistake, 388. It is well said by Wharton, in his work on Evidence, section 931: "Before the rules excluding parol testimony to vary documents can be applied, we must determine a document legally exists. That it exists must be shown by parol, and the proof of such existence may be attacked by proof that the execution of the document was a nullity, having been coerced by duress, or elicited by fraud," etc. The well recognized doctrine, here so clearly and forcibly announced, was especially applicable to this case. There were, as is generally the case, two distinct and opposing theories upon which it was being tried. The plaintiff was proceeding upon the hypothesis that the verbal understanding reached between appellant and the station agent, about the first of July, when the latter informed him that he could furnish him the cars at \$25 a car, was the contract, and only contract, under which the shipment was made; that the instrument signed by himself and the agent was executed on his part under the belief that it was a mere pass over appellee's road, and that this belief was induced by the conduct and misrepresentation of the agent of appellee. The case, on the other hand, was tried upon the theory that the instrument in question is a valid and binding agreement, and as such affords the only evidence of the contract between them for the transportation and carriage of the cattle, — that all prior and contemporaneous declarations and statements of the parties were merged in the written agreement. Now, whether the one or the other of these theories was true, was clearly a matter of proof, and the only way of establishing the truth or falsity of either hypothesis was by showing just what passed between the parties. This the

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court refused to permit, and we think it was error, for which the case should be reversed.

The judgment of the Appellate Court is reversed, and the cause remanded, with directions to that court to reverse the judgment of the Circuit Court, and remand the cause for further proceedings in conformity with this opinion.

Judgment reversed.

WALKER and SCOTT, JJ., dissenting.

 HAAS V. MYERS.

(111 Ill. 491.)

Contract — by telegraph — when complete.

It was agreed between A. and B. that A. should go west to buy cattle, and should telegraph to B. the price per head if he purchased; that B. should immediately telegraph "yes" if he was willing to take an interest of one-third in the purchase; that A. was then to telegraph him stating the amount required of him, which he was to deposit in a Chicago Bank to the credit of A. and his brother, so that the latter might draw, and might cause the bank to telegraph A. of the deposit. A. bought the cattle for \$55,000, and telegraphed B. the price per head, and B. answered "yes," but the dispatch never reached A. Subsequently B. telegraphed A. to buy the cattle if good, but A. and another had bought them before that dispatch was received. The next day B. arrived and offered to pay his share which was refused. *Held*, that there was no complete contract between A. and B.*

BILL to declare a partnership, and for an accounting. The head-note states the facts. Bill dismissed below.

Dufee, Judah & Willard, for appellant.

Judd & Whitehouse and *William Ritchie*, for appellee.

SHELDON, J. It is insisted upon on the part of the appellant, that the partnership here claimed was actually formed; that if there was not a literal there was a substantial performance by Haas of the conditions of the contract; that he did all that he could — telegraphed as he had agreed his acceptance — and could

* See note, 32 Am. Rep. 40.

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do no more until action by Myers; that not putting up his share of the money in the manner provided was because of the failure of Myers to advise him by telegram of the amount necessary, that the telegraphic acceptance sent by Haas, although not received, had all the legal effect it could have had if it had been received by Myers. In support of this last proposition the rule governing the negotiation of contracts by correspondence through the mail is appealed to, and it is contended the same rule applies in the negotiation of a contract by telegraph, that rule being, that where parties undertake to contract by letter, and one party makes a proposal by letter, and the other by letter accepts and posts his acceptance, the minds of the parties have met, and from the instant of mailing the acceptance the contract is a valid and binding one. See *Household Fire Ins. Co. v. Grant*, 4 Exch. Div. 216; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Moctier v. Frith*, 6 Wend. 103; *Hallock v. Insurance Co.*, 2 Dutch. 268; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Abbott v. Shepard*, 48 N. H. 14; *Trevor v. Wood*, 36 N. Y. 307; *Pomeroy* Cont. 95, and cases there cited. Although there be contrary authority that a contract made by mutual letters is not complete until the letter accepting the offer has been received by the person making the offer (see *Lewis v. Browning*, 130 Mass. 175), we regard the weight of authority to be in favor of the rule as first above stated. A distinction has been taken, that though in general such a contract takes effect from the time of acceptance and not from the subsequent notification of it, yet the offerer may not be bound by the fact that the letter of acceptance had been put in the post-office, if the letter never reached its destination. The preponderance of authority does not appear to sustain this distinction, but to hold that the mailing of the letter of acceptance completes the contract whether the letter reaches its destination or not. In the above cases, in 4 Dill. and 36 N. Y., it was held that the same rule applied in the case of correspondence by telegraph as in the case of correspondence through the mail. Whether the rule does so fully apply in the former case we do not find it necessary now to determine, as conceding that it does, we do not consider that the rule has application to the facts of the present case. We think that under the arrangement entered into between the parties, the formation of the contract was made dependent upon the actual communication by telegraph to Myers, of Haas' acceptance. This

is not the case of an offer made and where the simple acceptance completes the contract between the parties. Haas' reply, if it had reached Myers, was not the conclusion of the bargain. Considerable remained to be done afterward on both sides. Myers, after the receipt of the dispatch, was to telegraph again giving the amount to be deposited. Haas was to deposit this amount. The bank was then to telegraph the credit to Myers, so as to make it available for the purchase of the cattle.

We think too the terms of the contract imply that Haas' answer, that he would take a third interest, should actually reach Myers and within a very short time, or the contract would not be binding. A large purchase was involved requiring the payment of a considerable amount of money. Promptness was necessary and it was important that Haas should furnish his share of the purchase-money necessary to complete the purchase. It was uncertain whether the cattle would be purchased by Myers, and if so whether Haas would want a third interest in them at the price they could be purchased for. It was therefore arranged that if Myers purchased he should telegraph Haas the price per head, and if Haas wanted a third interest at the price he should immediately after receiving Myers' dispatch, answer back by telegraph "yes" or "no." If the answer was "yes," then Myers would immediately inform Haas by telegraph of the amount of money that would be required to be placed to the credit of A. Myers & Bro. at the First National Bank in Chicago in order to secure a third interest in the purchase of the cattle. Now Haas never did advise Myers by telegraph that he would take an interest. No such telegram ever came to Billings — the place of destination. Manifestly, delivering the message containing an affirmative reply to the telegraph office for transmission did not answer the purpose. Myers could not act upon that mere delivery. He must have knowledge. Haas was to telegraph and if the answer was "yes," Myers was to telegraph back the amount of money required; but he could not telegraph back what was the amount of money needed until he was informed of Haas' desire to take a third interest — until he had received the telegram "yes." This shows that it was in the contemplation of the parties that this telegram should not merely have been deposited for transmission, but that it should have been transmitted and been received before there could arise between the parties any completed contract. It was essential that notification of Haas' desire to have a part in the purchase should

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have come to Myers, to enable him to inform Haas of the amount of money needed from him, and so enable Haas to perform on his part by furnishing his share of the purchase-money.

But further, within an hour after depositing in the telegraph office, for transmission, his telegram of acceptance, "yes," Haas sends this misleading dispatch: "If Murphy cattle are good, there is no danger in buying them," and this telegram was received by Myers October 2, and was the only one received by him, or that ever came to Billings in answer to his inquiry, if Haas wanted an interest in the purchase. What was Myers to understand from this? If Haas wanted an interest in the cattle, the telegram agreed upon between him and Myers by which he should signify that wish, was the word "yes." This was not such a telegram, and it does not express any idea that Haas wanted or would take an interest in the cattle. It stated merely that upon a certain hypothesis — if the Murphy cattle are good — there is no danger in buying them. We think that Myers was justified in taking this dispatch sent by Haas, as an abandonment of all interest in the contract, or at least as denoting a want of consent on Haas' part to take an interest in the cattle, and a want of intention of completing the proposed contract in furnishing a part of the purchase-money, and that Myers could not place further reliance thereon, but might well proceed in the completion of the purchase from Murphy, by raising himself, and with the assistance of Martin, the whole amount of the \$15,000 required to be paid on that day to Murphy, and claim the purchase as being his own, to the exclusion of Haas from any share in it. This second telegraphic dispatch did not come within any arrangement made between Haas and Myers, but was Haas' own independent, voluntary act, and he alone is to blame for its misleading effect. The \$15,000 which was to have been paid on moving the cattle from the ranch, Murphy was insisting must be paid on October 2, or that he would refund the \$5,000 paid, and declare the trade "off" — that he would not wait any longer. Myers and Martin, after receipt of that dispatch, raised the money on that day and paid it. To be sure Haas appeared in person, at Billings the next day, and offered to perform. This we think was too late. It would not be a substantial performance. It was essential that he should have performed before; that he should have contributed his share to the payment of the purchase-money that was paid to Murphy; that he could not after leading Myers to think

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that he did not want an interest in the purchase, and the latter and Martin raising and paying all the purchase-money required, come in afterward, though only the next day, and then offer to pay his share of the money, and demand the right of participation in the purchase. To have then admitted Haas into the purchase would have been but a matter of favor with Myers, not of obligation.

We think the decree dissolving the injunction and dismissing the bill was right, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

BRANT V. GALLUP.

(111 Ill. 487.)

Damages — breach of contract — avoidable not recoverable.

Where one has employed an agent to procure insurance on his property, and knows of his neglect to do so in ample time to procure it himself, he cannot hold the agent for a loss by such neglect.

ACTION for breach of contract. The head-note shows the point. The defendant had judgment below.

J. Lyle King, for appellant.

Paddock & Addis and *Emory A. Storrs*, for appellee.

WALKER, J. [Omitting other points.] It is claimed that the tenth instruction is vicious, and it was error to give it. It in substance informed that if they believed from the evidence that appellant had been informed a sufficient time before the fire that the theatre was inadequately insured, then it was his duty to have effected additional insurance if he deemed it necessary, and failing to do so he could not recover. This involves the question, whether in case of a breach of a contract for indemnity the person indemnified, knowing of the breach of the agreement, may lie by and permit the loss to occur without a demand of performance of the agreement, or to take other steps to secure himself from the loss, by performing the acts undertaken to be performed by the other party, or to procure other indemnity. The substance of this instruc-

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tion is, that the party indemnified shall take such steps. It has been repeatedly held that a party being damaged cannot stand by and suffer the injury to continue and increase, without reasonable effort to prevent further loss. Justice and the principles of fairness require that every one shall use all reasonable efforts to preserve his property and protect his interests, even against the wrong or negligence of another. It is said it is not only the moral but the legal duty of a party who seeks to recover for another's wrong, to use due diligence in preventing loss thereby. This principle applies to a breach of contract, and a party is not entitled to compensation for injurious consequences from such breach, so far as he had the information, time and opportunity necessary to prevent them. See Sedg. Dam. (6th ed.) 106, both text and note, and authorities cited.

The same principle has been recognized by this court in cases of trespass. If the doctrine is correct (and we perceive no reason on principle or authority to doubt it) then it was the duty of appellant to have procured insurance. Gallup & Peabody, so far as is disclosed by the record, never after the mortgage was executed procured a dollar of insurance on the buildings. It is however claimed that they directed the insurance agents to issue policies, and when called on by the agents, appellant paid the premiums. If this is true, appellant was fully informed of the extent they had ordered insurance for him, and as he made no objection to the amount, he must have been satisfied. Had he not been, he surely would have seen them, and ordered more, and as he did not, he accepted what they did as a performance of their part of the contract. Knowing the amount they ordered, if not satisfactory, and the contract was broken by a failure to order more, it was the duty of appellant to procure such an amount as he regarded necessary, and failing to do so under the authorities referred to he could not recover. This instruction therefore was not erroneous, and no error was committed in giving it.

Judgment affirmed.

SHELDON and MULKEY, JJ., dissenting.

CITY OF CHICAGO v. O'BRIEN.

(111 Ill. 582.)

Municipal corporation — requirement that lot owners shall clear snow and ice from sidewalk.

A city has no right to require owners or occupants of lots to keep the sidewalks in front clear of snow or ice or to sprinkle ashes or sand thereon, and inflict a fine for neglect.

ACTION for violation of an ordinance. The head-note shows the point. The defendant had judgment below.

Geo. Mills Rogers and M. R. M. Wallace, for appellant.

C. C. & C. L. Bonney and Lyman M. Paine, for appellee.

SCHOLFIELD, C. J. It is conceded by counsel for appellant that this court, in *Gridley v. City of Bloomington*, 88 Ill. 554; s. c., 30 Am. Rep. 566, decided the only question involved in this case (namely, the validity of the ordinance under which the suit is prosecuted), against appellant; but they contend that decision is based upon incorrect grounds, and should therefore be overruled. They contend that the ordinance is but a proper police regulation, and that as such it should be sustained. In support of this position they cite *Bonsall v. Mayor, etc.*, 19 Ohio, 418; *Paxon v. Sweet*, 13 N. J. (1 Green) 196; *Mayor, etc., v. Mayberry*, 6 Humph. 368; s. c., 44 Am. Dec. 315; *Washington v. Mayor, etc.*, 1 Swan, 177; *Woodbridge v. City of Detroit*, 8 Mich. 274, and other cases.

In *City of Chicago v. Larned*, 34 Ill. 203, a case very elaborately argued by able counsel, the principle involved in the decisions of these cases was carefully considered, and it was held they could not apply here; that they were decided under Constitutions so materially different from ours, that the same line of reasoning is not applicable to both. And in *City of Ottawa v. Spencer*, 40 Ill. 211, which was a proceeding to charge the adjacent lot owner with the cost of building a sidewalk, the same question was again before the court, and it was then insisted, as it is now, that the charges may be sustained as within the police power, but the position was held untenable. In passing upon this point, it was there said: "It

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is also urged that this may be referred to the police power of the State, which has been delegated to the city, and may therefore be properly exercised; and in support of the proposition we are referred to the decisions of the Supreme Court of Tennessee. *Mayor, etc., v. Mayberry*, 6 Humph. 368; s. c., 44 Am. Dec. 315; *Washington v. Mayor and Aldermen of Nashville*, 1 Swan, 177; *White v. Mayor and Aldermen of Nashville*, 2 Swan, 364. These cases go to the length of sustaining the doctrine contended for by plaintiffs in error. They announce the doctrine that such improvements may be compelled under the general police power. If this be so, by an exercise of the same power we presume that the owner could be compelled to construct and keep in repair public roads, bridges and culverts fronting upon or running through his lands, or the owner of a city or village lot could be compelled to make and repair the street in front of his property. A sidewalk is a portion of a public highway, appropriated, it is true, to pedestrians alone, but still open and free to all persons desiring to use and enjoy it as a public highway. It is as much a public highway in the mode of its use as the street itself. The difference in the manner of their use does not render one public more than the other. They are both free to be properly used and enjoyed by the entire public, and are constructed alike for their use. That the legislature may afford the necessary power of constructing such improvements so essentially necessary to the comfort and convenience of the community is apparent; but under our Constitution we think the mode authorized in this case is not sanctioned, and that the principles announced in the case of *Larned v. City of Chicago* fully govern and control this case."

Even the police power, comprehensive as it is, has some limitations. It cannot be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be for the time, to the public health, safety, etc. And upon like principle, a purely public burden cannot be laid upon a private individual except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation. The drainage of malarial swamps would surely largely contribute to promote the public health; but could it be contended that therefore the burden of such drainage may be laid upon some single person to be arbitrarily selected, or upon those who happen to own the adjacent

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dry land, in disregard of the principles applicable to special assessments and special taxation? Undoubtedly the allowing of ice and snow to remain upon a sidewalk may be declared a nuisance, but it must be a public nuisance and one too not caused by the act of the adjacent property holder, but solely by the action of the elements. No one questions the right of the municipality to prevent such use of property and such action of the citizen as may be injurious to the public; but the adjacent lot owner has no ownership or control of the adjacent street, and this ordinance seeks to control the action of no one while on the street. The lot owner is held responsible solely and simply for the accident of owning property near the nuisance. He may have no more actual control of the street, or necessity to use it than if his property were miles away; still he is held responsible for a result he could not control, and to the production of which he did not even theoretically contribute. The gist of the whole argument is merely that it is convenient to hold him responsible. It is not perceived why it would not be equally convenient to hold him responsible for the entire police government of so much of the street.

Counsel seem to wish to draw a distinction between the present case and the cases of *City of Chicago v. Larned*, and *City of Ottawa v. Spencer, supra*, upon the ground that it is here neither sought to construct nor repair a sidewalk, but simply to keep it in a passable condition. But the difference is in the extent and not in the character of the burden sought to be imposed. The principle is precisely the same in each case. The object is to fit the streets, or so much as is occupied by sidewalks, for travel; and if the power to compel the private person to accomplish this result exists at all, it must extend to the necessary means in each case. It is impossible to point out why the removal of a snow bank should rest on a different principle from that applicable to filling a hole or nailing down a board.

We are satisfied with the entire correctness of the ruling in *Gridley v. City of Bloomington, supra*, and being so satisfied the judgment below must be affirmed.

Judgment affirmed.

DICKEY, SHELDON and CRAIG, JJ., dissenting.

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PARKER V. STATE.

(111 Ill. 581.)

Constitutional law — requiring fishways in dams.

The defendant owner of an ancient mill dam procured an act of the legislature authorizing him to raise it or erect a new one. The dam was always of such construction as to prevent the passage of fish. A subsequent statute imposed on dam owners the duty of placing fishways in them. *Held*, (1) that the act was constitutional generally, and (2) in respect to the defendant in spite of the prior special act in his case.*

ACTION for a fine. The opinion states the case. The plaintiff had judgment below.

A. J. Hopkins and N. J. Aldrich, for plaintiff in error.

Eugene Canfield and R. P. Goodwin, for people.

WALKER, J. This case involves the question whether an act of the general assembly is or not unconstitutional. We are fully impressed with the gravity of the question involved, and the important if not vast results that must flow from its determination. There are few questions that more vitally concern the future interests and welfare of the people than does this question. Again it is always a delicate matter to review the action of the other co-ordinate branches of government, who act under the same obligations to observe and support the Constitution that are imposed upon us. We have therefore, in view of these considerations, bestowed an unusual amount of labor, thought and pains in the investigation of the question, and shall proceed to state our conclusions.

The act under which this proceeding was instituted was adopted on the 31st of May, 1879 (Sess. Laws, page 171), which is declared to be an amendment to a prior act. It provides: "That it shall be the duty of any person or persons who now owns, or may hereafter erect, any dam or other obstruction across any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous or other water-courses within this State, to place therein suitable fishways, in order that the free passage of fish up or down or through such

*See *Comm'rs v. Holyoke W. P. Co.* (104 Mass. 446), 6 Am. Rep. 247; *State v. Franklin Falls Co.* (49 N. H. 240), 6 Am. Rep. 518, to same effect.

waters may not be obstructed." And it imposes a fine not exceeding \$200 a year for not complying with the requirements of the statute, to be recovered before any justice of the peace of the county where such dam or obstruction may be situated. Defendant being the owner of a dam across Fox river, and refusing to comply with the law, was prosecuted before a justice of the peace, and on a trial a judgment was rendered against him. He appealed to the Circuit Court of the county, where a trial was had with the same result, and he brings the case to this court on error, and urges a reversal.

All the facts are conceded by stipulation of the parties. It is agreed that the dam was erected across Fox river, where it now stands, in the year 1836, and was raised to its present height in July, 1853, and has been so maintained ever since; that in 1842 Michael C. Parker, a remote grantor of plaintiff in error, purchased the land on which the mills and dam are situated, from the general government; that M. C. Parker, in 1867, procured the passage of an act of the general assembly authorizing him, his heirs or assigns, to raise this dam higher, or to erect a new one at that place; that the dam always has obstructed, and now obstructs, the passage of fish in the river, and to construct a fishway in conformity to the act would cost about \$600; that plaintiff in error has owned and used the mills and dam since in 1871, and maintained the dam at its present height since that time; that he has succeeded to and is possessed of all the rights with which Michael C. Parker was invested. These are the material facts of the case.

Plaintiff in error insists that he has a prescriptive right to maintain his dam as now constructed, as it has been used in its present condition, by himself and grantors, for more than twenty years; that the law requiring him to construct a fishway connected with his dam would be to deprive him of his rights without due process of law, if intended for public use, without due compensation, or if for private use, then not only without compensation but without the semblance of constitutional warrant. He also contends that the act of 1857 was a charter, and as such is or contains a contract, and this law violates its obligation, and is repugnant to the contract clause of the Federal and State Constitutions, and is therefore void. When the dam was erected it was without right, and by a trespass on the lands of the government, and before Michael C. Parker purchased the land of the general government, the legislature had by enactment, in 1840 (Sess. Laws,

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98), declared Fox river a navigable stream and public highway. It then follows that he purchased subject to the power of the legislature to control the use of the stream to the same extent it had to regulate the use of other streams in the State which were navigable in fact. After the passage of that act Parker maintained his dam as an obstruction to a navigable river, and in violation of that law, because by the passage of that act it became public in its use, and its use was under the control of the legislature. He in all probability, to obtain a license to maintain his dam, procured the passage of the act of 1857, authorizing him to raise the height of the dam or to erect a new one; but did that act withdraw or surrender permanently the power of the general assembly to protect the passage of fish in the stream? There is no rule of construction more familiar or more firmly established, than that all grants of powers must be taken most strongly in favor of the State and against the grantee. In such cases nothing passes that is not in the letter or by clear and unmistakable implication, and when the State makes a grant, the thing or right is subject to legislative control, precisely as other rights not derived from government; and inasmuch as this was a license to maintain a dam in a navigable river, we have no right to hold that the legislature intended to repeal the act of 1840, so far as it related to the river above this dam. Such would be the effect if it should be held that Parker, his heirs or assigns, may maintain a complete obstruction at that place. It is not a reasonable inference that the general assembly contemplated such a result. The act contains no language that in terms, or by implication, declares such a purpose. We must therefore hold that the license was made subject to legislative control. There is nothing in the act that warrants the conclusion that the general assembly designed to permanently surrender any portion of its power of control over this river for the protection of fish. That the legislative branch of government has the power to prevent the erection and maintenance of obstructions in navigable streams cannot be successfully controverted, and all must know that any obstruction to the passage of fish necessarily must obstruct the passage of boats and other water craft. We therefore have no hesitation in saying that the legislature, if it had the power, never intended by that act to permanently abandon the control for the free passage of fish in this river. Had it intended to repeal or amend the act of 1840, it is but reasonable to suppose it would have been done in terms.

There are some things, and they are the most essential of all to man, that are incapable of individual ownership. Such are air and water. All may and do participate, without restraint, in their enjoyment. They are the common inheritance of mankind. There are other things to a large extent incapable of individual ownership, and of these are game and fish, and they belong to the entire community, collectively; and belonging to all equally, for their protection from extinction, and to preserve the common ownership in all, they are, and of necessity have ever been, subject to legislative control. If they were not, the few would, by their destruction or appropriation, deprive the balance of the community of their rights in this common inheritance. Belonging to all, common justice requires their preservation for the use and enjoyment of all. From the wild and wandering nature of fish they are not, nor can they be, the subject of ownership in running streams, like animals and fowls which have been domesticated. The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership. This must be so from absolute necessity. There is not, nor can there be, any other means of protecting each individual in the enjoyment of the rights his joint ownership confers, hence the necessity of legislative action to preserve and protect the rights of each and all in their common inheritance. Therefore the power of the legislature to act must be admitted.

The common law has always recognized the right of the riparian owner to take fish in the waters running over his own soil, and appropriate them to his own use; but the fish being the common property of the people, such owner has never had the right to obstruct their passage from that portion of the river which flows over his land, nor has he the right to wantonly destroy the fish passing over it, and thus deprive the community of their right to and ownership in the fish, hence the manner in which, the time when, and the amount such riparian owner shall take, for the preservation of the common property, is a legislative and governmental function.

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Government was organized to protect the general and collective rights of the governed as fully as the individual rights of each member of the body politic, and this power, as we shall see, has been exercised as a legislative function by the British parliament almost from the time of its organization, as well as by our State governments since their organization.

At an early period before and immediately after our State government was organized, the legislature adopted what is now chapter 28 of the Revised Statutes of 1874, and that provision has ever since remained in force in this State. It provides: "The common law of England, so far as the same is applicable and of a general nature, and all acts of the British parliament made in aid of and to supply the defects of the common law, prior to the fourth year of James I" (excepting several statutes specified), "and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." We shall refer to Magna Charta and some of the early British statutes on this subject in aid of the common law, to show that under that law the regulation of the right to take fish, and for their increase and preservation, was always considered a legislative function. Under the common law, obstructions to the passage of fish were held to be public nuisances, and subject to legislative control.

That these rights were always, from the earliest times, considered of great public interest and of vast importance, is manifest from Magna Charta and the early British statutes. The arbitrary kings after the conquest claimed the game and fish in the kingdom as a part of their prerogative, and conferred on their favorites and dependents royal franchises to take game and fish, to the exclusion of the people. This being in derogation of common right, there were many struggles to compel their monarchs to restore their ancient rights. The first that proved successful was in 1215, when King John was compelled to restore them by Magna Charta. The restoration of the rights it confirmed had been petitioned for during several previous reigns, but although promised, were never restored. Succeeding monarchs disregarded its provisions, but they were compelled to reaffirm the great charter. The thirty-ninth chapter of that instrument declares: "All kydells (weirs) for the future shall be quite removed out of the Thames and the Medway and through all England, except on the sea coast." Thom. Es. Mag. Ch. 81. This

charter or declaration of rights was confirmed by Henry III, in 1216 (id. 112), and again by the same monarch in 1217 (id. 125), and a third time in 1224-25. Id. 138. It was also confirmed by Edward I, in 1297, and in each of these confirmations the provision in regard to weirs is in precisely the same language. As illustrating the great importance attached to the right of fishery, the forty-eighth chapter of the same charter provided: "All evil customs of forests and warrens, and foresters and warreners, * * * water banks and their keepers, shall immediately be inquired into by twelve knights of the same county, by oath, * * * and within forty days after inquisition is made they shall be altogether destroyed by them, never to be restored." Id. 85. 'This author, in his notes (page 203), says, speaking of this last provision of the charter: "It ordains that river banks shall not be defended excepting at their ancient places and boundaries; and its intent was, says Lord COKE, that no owner of such banks should in the future so appropriate or keep the rivers separate to himself as to prevent others from fishing or having passage at them." Sir EDWARD COKE says that Magna Charta and the Charta Foresta have "been confirmed, established and commanded to be put into execution by thirty-two several acts of parliament in all;" and inasmuch as this provision in regard to weirs seems to have been embraced in all of them, it establishes beyond all question that the power to control the exercise of the right of fishery was then, as it has been ever since, regarded as of national concern, and of such public importance as to form one of the chapters of the Constitution or Bill of Rights of the British people, maintained only by long and bitter struggles.

The first statute we shall refer to is the 2d Westminster, 13th Edw. I. It provides: "The waters of Humber, Owse, Trent, Dove, Arre, Derwent, Wherfe (Nid, Yore), Swale, Tese (Tine, Eden), and all other waters (wherein salmons be taken), shall be in defence for taking salmons, from the Nativity of our Lady unto St. Martin's day; and likewise, that young salmons shall not be taken nor destroyed by nets, nor by other engines, at mill pools, from the midst of April unto the Nativity of St. John the Baptist; and in places (where as fresh waters be) there shall be assigned conservators of this statute, which, being sworn, shall oftentimes see and inquire of the offenders; and for the first trespass they shall be punished by burning of their nets and engines, and if they offend a second time they shall be punished by imprisonment for a quarter

of a year, and if they offend a third time they shall be punished by imprisonment for a whole year, and as their trespass increaseth so shall their punishment." 1 Eng. Stat. at Large, 211. The 13th Richard, 2 C. 19, contains similar provisions. The 1st Eliz. 17, prevents the taking of young fry or spawn of fish, and it also prohibits the taking of various kinds enumerated, under specified lengths. The 3d Jac. 1 C. 12, prohibits the erection of weirs at specified places, or using nets to destroy the fry or spawn of sea fish. And there are a number of ancient statutes that are local to counties or particular streams. There are other statutes of the same character adopted by parliament, on the same subject, that might be referred to. It thus appears that the preservation and the regulation of the mode and time of taking fish was of public concern, and a proper subject of legislation. It is thus distinguished from a mere private right not within the domain of legislation.

But as bearing on this question, as on the question of prescription, we will refer to some cases that shed much light on it. In *Weld v. Hornby*, 7 East, 195, Lord ELLENBOROUGH said: "The erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances. The words of Magna Charta are, that 'all weirs from henceforth shall be utterly pulled down by *Thames and Medway, and through all England*,' etc. And this was followed up by subsequent acts treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straitening or enlarging of those which had aforetime existed. I remember that the stells erected in the river Eden by the late Lord Lonsdale and the corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced, in this court, upon a motion for a new trial, to be illegal, and a public nuisance. Now, here it appears that previous to the erection of this complete stone weir there had always been an escape for the fish through and over the old brushwood weir, in which those in the stream above had a right, and it was not competent for defendant to debar them of it by making an impervious wall of stone, through which the fish could not insinuate themselves as it is well known they will through a brushwood weir, and over which it is in evidence that the fish could not pass except in extraordinary times of flood; and however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer

standing.” In the same case, LAWRENCE, J., said: “There is no bar to the action from any length of possession in the defendant.” That case was by an upper riparian proprietor, and it appeared by ancient deeds that for two centuries before that time the owners of the mill and weir had the right to maintain them, as expressed in the deeds; nor did they limit it as to its height, nor the materials of which it should be constructed. It is true in that case the cause of action accrued within twenty years, but Lord ELLENBOROUGH referred to a case decided in the King’s Bench, where it was held that such obstructions were illegal and a public nuisance, and he so announced the doctrine in the case he was then deciding. We are aware that in comparatively recent cases in the courts of that kingdom the doctrine of *Weld v. Hornby* has been disregarded, but we prefer the exposition of the common law in that case to the more recent decisions of their courts, and are inclined to follow it as the better doctrine.

In the case of *Eubank v. Pence*, 5 Litt. (Ky.) 338, which was a condemnation proceeding for the erection of a mill and dam, the court said: “The inquest of the jury taken under the writ of *ad quod damnum* which issued in this case, not having ascertained whether or not fish of passage will in any degree be obstructed, the court erred in ordering the mill seat to be condemned, and in giving permission to Pence to erect a mill. The order therefore must be reversed with costs, the cause remanded to the court below and the inquest of the jury quashed,” etc. The legislature of Kentucky at an early period adopted the common law of England, and all statutes of the British parliament in aid thereof, and of a general nature and applicable to the condition of the people, passed prior to the American revolution, with exceptions similar to our statute. But concede this was under a statute of the State, still it shows the preservation of fish was regarded as of such public concern as to fall within the domain of legislative power. If not under such an enactment, it must have been under ancient British statutes.

In the case of *Stoughton v. Baker*, 4 Mass. 522 (two years subsequent to the decision of *Weld v. Hornby*, *supra*), Chief Justice PARSONS, in delivering the opinion of the court, said: “But the right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights by compelling him to make compensation to the owners of land above, for dam-

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ages occasioned by overflowing their lands. Another was to protect the rights of the public to the fishery, so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passageway shall be allowed for the fish. This limitation being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no *laches* can be imputed to the government, and against it no time runs so as to bar its rights." Another objection, he says, was urged that if the resolution was constitutional, the legislature might authorize strangers to enter without right on the freehold or lawful possession of another. To this he answered: "This objection, supposing strangers enter without right, is begging the question; for if the owner of the dam holds it under the limitation mentioned, that limitation must extend to give a right to the government to enter and remove obstructions, which, if not removed, would defeat the limitation." This case was followed by a number of cases, among others the cases of *Commonwealth v. Chapin*, 5 Pick. 199; s. c., 16 Am. Dec. 386, and *Vinton v. Welsh*, 9 Pick. 87, which recognize the exclusive right of riparian owners to take fish on their own lands, but expressly hold, as against the public they have no right to obstruct their passage, and it is expressly held that the right is under legislative control.

In the case of *Carson v. Blazer*, 2 Binn. 475; s. c., 4 Am. Dec. 463, it was held that the common law never prevailed in the State of Pennsylvania, which recognizes the exclusive right of the riparian owner to take fish in a stream flowing in front of or bounding his land, and such has been the recognized doctrine of that tribunal ever since. It has been followed by subsequent cases in that court.

In the case of *Hooker v. Cummings*, 20 Johns. 90; s. c., 11 Am. Dec. 249, the doctrine of the common law was fully recognized and applied, and it was said: "The legislature have confessedly the right of regulating the taking of fish in private rivers, and do every year pass laws for that purpose as to rivers not navigable in any sense, and which are unquestionably private property."

The cases here referred to fully establish the doctrine that whatever the private right of taking fish in streams flowing over a man's land, it is under the limitation that its exercise may be regulated

and controlled, as public necessity may require, and they clearly announce the rule that their free passage may be secured by enactment, or it is secured by the common law.

As early as in 1807 the territorial legislature of Indiana adopted an act for the purpose of preserving fish in our waters, this State then being a portion of that territory. The act provided for the condemnation of mill seats by a writ of *ad quod damnum*. It required the jury impanelled, to assess damages by reason of constructing the mill dam; also to inquire whether, and to what extent, fish of passage or migration would be obstructed, and by what means such obstruction could be prevented. This law was in force when our territorial government was organized. The provision in relation to fish was dropped out when the laws were revised, after the State government was organized, and only restored by the act to which this is an amendment. In 1817 the territorial legislature passed an act authorizing Ezra Owen to erect a dam in the Kaskaskia river, for the purpose of taking fish. It contained a provision that the dam should not obstruct the passage of fish or ordinary navigation. Sess. Laws 1817-18, 26. This act was retained in the revision of 1819. Laws, 351. It is thus seen that in that early period of our history the legislative branch of our government claimed and exercised the power of preserving the fish in our waters. At that time it appears the exercise of the power was regarded as an inherent and unquestioned function of legislation.

But if any doubt existed, it is removed by the twenty-second section of article 4 of our present Constitution. It provides that the general assembly shall not pass local or special laws in a number of enumerated cases, and among the cases enumerated is "the protection of game and fish." This unmistakably recognizes the power as then existing, and undeniably authorizes its exercise. This must end all dispute as to the power. This limitation of the power of the legislature in all of the cases enumerated refers to matters of a public nature, and among them is the protection of fish, which was regarded so important to the public that the legislature was restricted and prevented from granting by special or local law, any privileges or exemption from a general law. It was esteemed too important a public interest to permit any person, even with the consent of the legislature, to escape from conforming to any general law which should be passed on the subject.

All must admit that from the remotest times game has been the

subject of protection by legislation in Great Britain, and in this country since its settlement; nor has any one until recently questioned the constitutional power to adopt such laws, and our Constitution places both the preservation of game and fish on the same basis and equality. There is no question that more concerns the public than an abundant supply of cheap and healthy food. In a densely populated country it is the all absorbing question that engages the attention of its people and the government. It is the basis of the happiness, prosperity and contentment of all peoples. And with our unparalleled increase of population, vast as is our domain, in a generation more it will become the all absorbing economical question for the government to solve. Even now in some portions of the Union it is taxing the energy of the people and the wisdom of statesmen to a high degree, to provide against pinching want; and it must be obvious to all that the question of the increase of the supply of food, and the preservation of the sources of its supply, are matters of the highest public concern. There are few if any questions that should attract the attention of the law-makers to a greater extent, because of its public importance. All will concede the vast importance of the commercial and manufacturing interests of the country, and in recognition of their importance these interests have received aid and protection from the government; but no one can say they are of paramount importance more than an abundant supply of cheap food for the people, nor should the sources of such a supply be sacrificed to either or both of the other great interests. Commerce, manufactures and trade concern the opulent or persons in easy circumstances, but the supply of food vitally concerns the struggling masses, upon whose labor the other interests are wholly dependent. Their labor is indispensable to the very existence of commerce, manufactures and trade, and their interests and wants are of as essential importance, and are as worthy of the protection of the government as the others. The interests of an owner of a mill or factory do not require the sacrifice of this great public interest by strained construction or refined distinctions. Its regulation is manifestly as public in its character as many others that have always been under legislative control, and never challenged or even questioned.

We now come to the consideration of the effects and consequences of holding that private individuals may acquire prescriptive rights against the public. If such a doctrine were to obtain, it would

amount to a repeal of this law. All the riparian owners on every stream in the State and many others could prove that they and their ancestors had for more than twenty years maintained weirs, and used seines, nets and other prohibited devices for the destruction of fish. If the claim of such prescriptive rights should be sustained, then all the fish in our streams would soon be destroyed, and the production of food decreased perhaps millions of dollars annually, and other food enhanced in price, so as to become oppressive to the poor and struggling masses — and the question, for these reasons, will annually grow in importance with our unparalleled increase of population. No one has questioned the power of government to protect cattle, sheep and hogs from disease, or the power to pass and enforce restrictions for their preservation for food for the great mass of the people. This may not be so important an interest as either of the others, but there is no doubt it is of great public concern. The legislature has the power, and is charged with the duty, of passing all laws for the preservation of the people and their morals, and to adopt all measures for the general welfare, and this law is eminently adapted to produce such results. At the ancient common law it was regarded as within legislative power to prevent the forestalling, regrating and engrossing of food, and they were prohibited by statute, for the protection of the people against unjust exactions in the price of food. If such were objects of legislation, then the preservation and increase of this article of food must necessarily be of great public as contradistinguished from private interest.

The act of 1857 does not possess a single ingredient of a charter for a corporation. It does not, in the remotest degree, refer to a corporation, or confer the slightest corporate powers or franchises, or any thing which can be tortured into a grant of such franchises. If the courts may torture that act into a charter, or hold that plaintiff in error is a corporation, then it might be held that almost any law on the statute book is a charter, and creates a corporation. To so hold in this case would be to disregard all definitions, distinctions and relations of things. It surely is not expected that this or any other court could so hold. It is so palpable that the act is not a charter, it is useless to search for authorities, as no one before, we presume, ever conceived such an idea.

On thorough examination and earnest reflection, we are impelled to the conclusion that the general assembly exercised legitimate

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and constitutional power in the adoption of the act of 1879, and did not thereby deprive plaintiff in error of any right of property or privilege. Nor did or could he acquire a prescriptive right against the public. We for these reasons conclude that this is one of the great purposes for which the State government was brought into existence, and the legislature has no competent authority to permanently grant or barter it away. That it may suspend the right, and license persons to create such nuisances, none can deny; but the license may be revoked at will, as the licensee acquires no vested rights under the license. This power can only be destroyed or withheld by the people when framing and adopting a Constitution.

Perceiving no error in the record, the judgment of the court below is affirmed.

Judgment affirmed.

DICKEY, J., dissenting.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

FELDER V. COLUMBIA AND GREENVILLE RAILROAD COMPANY.

(21 S. C. 35.)

Carrier — connecting lines of railroad — joint contract — baggage.

The sale of a through ticket over two connecting railroads is not evidence of a joint contract by which the second is liable for the loss of baggage by the first.*

ACTION for loss of baggage. The opinion states the case. The defendant had judgment below

Andrew Crawford, for appellant.

Pope & Haskell, contra.

McIVER, J. The plaintiff brings this action to recover damages for the loss of her trunk and its contents while travelling over a line of connecting railroads, of which the defendant is one from Atlanta, Georgia, to Columbia, South Carolina. The material allegations of her complaint are as follows: "That during the month of December, 1881, and on or about the twenty-seventh day thereof, she was

* To same effect, *Halliday v. Kansas City, etc., Ry. Co.* (74 Mo. 159), 41 Am. Rep. 809; see also, *Mont. & Eufaula R. Co. v. Culver*. (75 Ala. 578), 51 Am. Rep. 483.

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a passenger on board of a train which left Atlanta that day over the Atlanta and Charlotte Air Line railroad, she having purchased a ticket from that point to Columbia, South Carolina, by way of the Atlanta and Charlotte Air Line railroad over the Columbia and Greenville railroad." Next follows an allegation "that while travelling over the lines of road and along the route provided by the terms of her ticket, at the time indicated in the foregoing paragraph, the said railroad officials took charge of this plaintiff's baggage, to-wit, a sole-leather trunk, * * which said trunk from that time has never been restored to the owner thereof, although repeated demands have been made for its restoration." And finally it is alleged: "That although this plaintiff and her baggage were carried for hire, yet these defendants not regarding their duty did not use proper care therein, but by the negligence and improper conduct of their servants said trunk and contents were wholly lost to the damage of the plaintiff \$800."

For a defense to this action the defendant insists, first, that the complaint does not state facts sufficient to constitute a cause of action against this defendant; second, upon a general denial of the allegations of the complaint above set forth; third, that defendant never undertook to carry and deliver the trunk alleged to have been lost and that the same had never been delivered to or received by defendant.

The testimony adduced on the part of the plaintiff is fully set out in the "Case," and was to the effect that the plaintiff, by her agent, bought a through ticket from Atlanta to Columbia; that the baggage master in Atlanta was requested to check the trunk in question, along with other baggage belonging to the party with whom the plaintiff was travelling to Columbia, who replied that he had no through checks, but that it was all right, and they would go through to Columbia all right, and wrote something on the trunks; that the trunk in question was first missed at Seneca city, and has not been seen since, the witness saying, "To the best of my knowledge it was not put on the Columbia and Greenville train;" that there was a connection of roads from Atlanta to Columbia by way of the Atlanta and Charlotte Air Line road over the Columbia and Greenville road during the time of the alleged loss of the trunk; that through tickets were sold over this route from Atlanta to Columbia, and *vice versa*; that the several roads of the line received compensation from the gross amount for which

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the through ticket sold according to the number of miles travelled on each of the roads; that there was an arrangement existing among these roads composing this line of travel having in view the diverting of travel from other lines which stretched out from Atlanta to the same point; that A. Pope was the general passenger agent of this line of roads, and had very large powers in relation to matters of passenger travel and their baggage; that he had authority to bind the roads in matters relating to his department, but could not override the authority of the presidents of the several roads, under whose authority he made the rates of transportation at important points; that said A. Pope, in replying to a letter of plaintiff's counsel, stated that a search for the missing trunk was being conducted under the direction of the general baggage agent, and that "if a liability is established upon either one of the roads at interest, viz., the A. & C. A. L. or G. & C. R. R., a properly audited claim for the value of the trunk will be promptly paid."

At the conclusion of this testimony on behalf of the plaintiff, a nonsuit was moved for and granted, upon the ground that "there was a total failure to prove any liability of the defendant company, as the loss had been proved to have occurred before defendant's line was reached, and that there was no evidence of any contract by which defendant could be held liable for loss of baggage on other lines."

The plaintiff appeals upon the following grounds: "1. That the railroads constituting the line, viz., the Atlanta and Charlotte Air Line and the Columbia and Greenville railroads were joint contractors for the carriage and delivery of passengers and their baggage, and as such responsible for the loss of the latter. 2. That it was proper practice to sue the Columbia and Greenville Railroad Company for the loss as proved in this action, they being one of the contractors. 3. That there was abundance of testimony in the cause sustaining the foregoing exceptions which should have been submitted to the jury for them to pass upon." The remaining ground of appeal, having been abandoned, need not be stated.

It is quite clear that the Circuit judge was entirely right in holding that there was an entire failure to prove any independent liability on the part of the defendant company, for there was not only no testimony tending to show that the missing trunk had ever been delivered to or received by defendant, but the plaintiff's own witness testified that the trunk was missed at Seneca city, before

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reaching defendant's line, and that to the best of his knowledge it was not put on the Columbia and Greenville train. The correctness of this seems to be recognized by the appellant, for in her exceptions the only point she makes is that the defendant was a joint contractor with the Atlanta and Charlotte Air Line railroad, to whom the trunk was delivered, and as such liable for the negligence of that company; or at least that there was sufficient evidence of such joint contract to require that the question should have been submitted to the jury.

The first and fundamental difficulty in the way of the plaintiff seems to us to be this, that there was no allegation in her complaint of any such joint contract, and no allegation that the trunk in question was ever delivered to or received by the defendant company, and hence the complaint failed to state facts sufficient to constitute a cause of action against this defendant, and for that reason should have been dismissed. But even assuming that the complaint did contain such allegations, we think that there was an utter lack of evidence to sustain either allegation. As we have already said, there was not only no evidence to sustain the last mentioned allegation, but the testimony distinctly disproved it. So that the only inquiry is whether there was any evidence tending to show a joint contract between these railroad companies whereby the one should become responsible for the default of the other. We have looked in vain through the testimony for any such evidence.

Surely, the fact that through tickets were sold from Atlanta to Columbia and from Columbia to Atlanta affords no such evidence. Through tickets are oftentimes intended as much, if not more, for the convenience and advantage of the travelling public as for that of the railroads over which they are sold; and if the principle should be established that the sale of through tickets over a line of connecting railroads constituted evidence of a joint contract between such roads whereby one would become responsible for the defaults of another, the effect would doubtless prove very injurious to the interests and convenience of the travelling public. For if such were the rule, railroad companies would not be very likely to make these arrangements so conducive to the comfort and convenience of passengers, as the effect would be to make each of the companies composing the line, no matter how long it may be, guarantors of the conduct of each of the other companies. A passenger buying a through ticket from Columbia or New Orleans to New York,

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and sustaining some loss or damage somewhere along the route, might bring his action against the richest, best equipped, and most carefully managed railroad constituting a portion of the line, and recover damages from it, when in fact his loss or damage was sustained while travelling over a link in the line owned by a totally insolvent corporation, in bad order and carelessly managed.

But we need not discuss the question, for we think that the point has been distinctly ruled in the very case so much relied on by appellant, *Bradford v. South Carolina R. Co.*, 7 Rich. 201. Nor do we think that there was any thing in the other evidence adduced tending to show any such joint contract between these companies as would make one liable for the defaults of the other. All of the evidence is entirely consistent with the idea that the only arrangement between these companies was the usual one for the sale of through tickets, whereby passengers would be attracted to the line composed of these different railroads, for their own convenience, and none of it points to the assumption of any joint liability.

The case of *Bradford v. South Carolina R. Co.*, *supra*, mainly relied upon by appellant, differs materially from this case. In the first place, there was in that case a distinct allegation that the several companies composing the line from Chattanooga to Charleston were *joint* contractors, and the testimony principally, if not solely, relied upon by the court as sufficient to establish such joint contract was, not the through receipt which the courts said would not be sufficient to establish it, but the fact that the defendant company had published an advertisement, in which they announced to the public that "by a recent arrangement between the South Carolina, the Georgia, and Western and Atlantic railroads, a through ticket for freight on cotton has been made from Chattanooga, Tenn., to Charleston, S. C., at the rate of sixty-five cents per 100 lbs. It is highly necessary, in order to insure correctness in the transaction of this business, that the agent of the South Carolina railroad at Hamburg should be aware of the number of bales and marks of each shipment. Shippers are therefore earnestly requested to take duplicate receipts; one of which must, in all cases, be forwarded per mail to the above-named agent, *in order to fix responsibility on this company.* With these precautions, the business can and will be transacted mutually satisfactory to all concerned. *The roads pledge themselves to give all practicable dispatch to cotton intrusted to them for transportation.*"

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The words which we have italicized in the foregoing advertisement showed very clearly that there was a joint contract, and certainly the South Carolina Railroad Company, in the face of these words, could not deny it. The evidence showing that duplicate receipts had been forwarded to the agent at Hamburg, and thus the condition upon which the liability of the defendant company was to attach having been performed, that company could not deny it, even though the testimony seemed to show that the damage to the cotton in question was sustained before it reached the South Carolina railroad; for that company had, by the terms of its advertisement, in effect, agreed that its responsibility should be fixed so soon as one of the duplicate receipts had been forwarded to its agent at Hamburg, which was done. The court therefore properly held that the evidence was quite sufficient to require that the question as to whether there was a joint contract should be submitted to the jury. But in this case we find no such testimony, and we see no error on the part of the Circuit judge in granting the nonsuit.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

SIMPSON, C. J., concurred generally, but McGOWAN, J., only in the result.

HERRING v. CANNON.

(21 S. C. 212.)

Mortgage — chattel — “instrument in nature of.”

A merchant bought an iron safe, with his name painted on it, and gave in payment notes, specifying that “in accordance with the terms of an agreement for the purchase of the safe, said vendors do not part with any title thereto until the purchase-money has been fully paid.” *Held*, that the notes were “instruments in the nature of a mortgage,” under the statute, and required to be recorded to be valid as against subsequent creditors or purchasers in good faith.

ACTION to recover personal property. The opinion states the case. The plaintiff had judgment below.

James F. Islar and S. Dibble, for appellants.

De Treville & Glover, contra.

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McGOWAN, J. This was an action for the recovery of possession, and for damages for the detention, of one patent Champion Iron Safe, claimed by the plaintiffs, valued at \$105.69, and alleged to be illegally detained by the defendant, Peter G. Cannon. It appeared that in August, 1880, the plaintiffs sold the safe to one E. S. Griffin for \$105.63, payable January 1 and April 1, 1881. The plaintiffs delivered the safe to the purchaser, with the name "E. S. Griffin" conspicuously painted on it. Notes were given for the purchase-money, with a condition embodied in these words: "This note having been given to said Herring & Co. in part payment for a safe, and in accordance with the terms of an agreement for the purchase thereof, said Herring & Co. do not part with any title thereto until the purchase-money has been fully paid."

Some time after the purchase of the safe, and while it was in his possession, the said Griffin contracted debts with Steffens & Werner and P. H. Hanes & Co., who had no notice whatever of the claim of Herring & Co. to the safe. These creditors sued Griffin, and recovered judgment against him, having in the meantime attached the safe, which was sold by the sheriff under an order of court in said process. At the time of the sale, the sheriff had been notified of plaintiffs' claim, but no public notice was given of it on the day of sale. James F. Izlar, Esq., who had also heard of the claim of plaintiffs, became the purchaser at the price of \$55, which was paid upon the judgments of said creditors. Izlar afterward sold and delivered the safe to the defendant, who was sued for the same.

The Circuit judge charged the jury that the condition on the note being in writing was effective "not only between the parties, but as to all other persons whatsoever; that at the time this contract was made, the law did not require that it should be recorded, or that notice should be given of its existence." Under this charge, the jury found a verdict for the plaintiffs, and the defendant appeals to this court upon the following exceptions:

1. "Because it being in evidence that one E. S. Griffin purchased the safe from the plaintiffs, and gave for the purchase-money thereof two notes, to each of which was added the condition [as before stated], and thereupon the safe was delivered to him, with his name, E. S. Griffin, conspicuously painted thereon, and remained in the possession of the said Griffin until seized under an attachment at the suit of subsequent creditors of the said Griffin, his honor, the presiding judge, erred in instructing the jury that at the

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time this contract was made, the law did not require that it should be recorded, or that notice should be given of its existence."

2. "Because his honor erred in instructing the jury that such a contract, at the time above-mentioned, was valid against subsequent purchasers for valuable consideration without being recorded or actual notice."

3. "Because his honor erred in instructing the jury that the decision in *Talmadge v. Oliver* must necessarily conclude this case."

Conditional sales of personal property delivered, annexing a secret condition to a visible transaction appearing to the world unconditional, gave rise, for many years, to much discussion and some difference of opinion in our courts. It may be safely stated that there was a general concurrence that such contracts might be enforced between the parties who made them; but as possession is *prima facie* evidence of title in relation to personal property, there were obvious difficulties as soon as they touched the rights of subsequent creditors and *bona fide* purchasers, who dealt with the apparent owner on the faith of title, springing from his unexplained possession. Such conditions in sales, whether verbal or in writing, were held valid as to the parties themselves and their subsisting creditors down to 1839. See *Dupree v. Harrington*, Harp. 391; *Reeves v. Harris*, and *Bailey v. Jennings*, 1 Bail. 563. But in that year was decided by a divided court the case of *Bennett v. Sims*, Rice, 426, which may be regarded as the leading case in sustaining such secret conditions, as it went so far as to hold that there was really no difference between a verbal and written condition, and in that case sustained one that was merely verbal.

That case however expressly excepted and reserved the question as to subsequent creditors and *bona fide* purchasers. In delivering the judgment of the majority of the Court of Errors, Judge EARLE said: "It is a remarkable coincidence in all the cases, beginning with *Dupree v. Harrington*, *supra*, down to the case under consideration, that neither the rights of subsequent creditors nor the rights of subsequent purchasers without notice are at all involved. * * * In regard to subsequent creditors, it will be time enough to provide for them when they complain. Whenever the vendor's right shall come in conflict with the claims of those who become creditors after the transfer of possession, then the court will endeavor so to modify the rule or restrict its operation, as to protect the rights of *bona*

fide creditors who may have trusted the supposed purchaser on the faith of the property in his possession."

In 1839 the law was thus announced, with a doubtful judicial saving as to the rights of subsequent creditors and *bona fide* purchasers, and immediately thereafter the legislature (possibly moved thereto by the decision in *Bennett v. Sims*) interposed and passed the act of 1843, "To amend the law in relation to recording mortgages and to regulate the lien thereof" (11 Stat. 256), afterward substantially embraced in the general registry act of 1876, and reenacted as section 2346 of the general statutes. This act has three sections. The first provides that "no mortgage or other instrument of writing in the nature of a mortgage of real estate shall be valid so as to affect the rights of subsequent creditors and purchasers, etc., unless the same shall be recorded, etc. The second provides that "no mortgage or instrument of writing in the nature of a mortgage of personal property, shall be valid so as to affect the rights of subsequent creditors or purchasers, etc., unless the same shall be recorded," etc. And the third declares "that every verbal agreement between the vendor and vendee of personal property, whereby the vendor, who has parted with the possession thereof to the vendee, shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors or purchasers for valuable consideration without notice."

It is insisted for the defendant that the paper in contention here is an "instrument of writing in the nature of a mortgage," which by the act was required to be recorded, and not having been, is null and void as to the subsequent creditors of Griffin, the vendee. By the contract, the vendors, who parted with the possession of the safe to Griffin, undertook to reserve to themselves an interest in the same, and therefore it is precisely such a contract as is denounced by the third section of the act, and if it were merely verbal would certainly be void. But as it is in writing the question is, whether it is such an "instrument in the nature of a mortgage" as is required to be recorded by the second section of the act. It is plain that the purpose of the act in all its sections was to protect the rights of subsequent creditors and purchasers against secret liens, and the third section shows that such contracts as the one before us were in the contemplation of the framers of the act. The mischief aimed at was the secret nature of the contract, not whether it was verbal or in writing, as to which distinction, Judge EARLE

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in speaking for the Court of Errors in the case of *Bennett v. Sims*, declared that he "had tortured his faculties to conceive a ground of difference, except only as to the facility and mode of proof."

There being then in this respect as to third parties no difference between a verbal agreement and one in writing, and the legislature having declared the former incapable of registry to be absolutely void, it would seem to be the natural and logical conclusion that as to the latter, which is capable of registry, they intended to accomplish the same result by declaring that it should be void unless recorded. We think such was the intention of the act. As was well said by Judge COTHRAN, in the Circuit decision of *Lombard v. Black*,* "The plain purpose of the statute was to render secret liens upon personal property ineffectual as against subsequent creditors and purchasers *bona fide*; and this doctrine finds sanction in the very principles of justice itself, especially in this, that where one of two innocent persons is to suffer loss, it should fall on him by whose conduct it was caused."

This view is not only based upon the express words of the act itself and the principles of justice, but as we conceive is supported by the adjudicated cases. The first case that arose after the passage of the act was that of *Cochran v. Roundtree*, 3 Strob. 222. In that the condition was verbal, and although it was made before the act, it was held to be void. In delivering the unanimous judgment of the court, Judge WARDLAW said: "Looking to the dangerous nature of such verbal stipulations (since that time guarded against by the act of 1843, which amounts to a legislative declaration concerning a debated point of law), to the policy which forbids a seller from availing himself of a secret condition annexed to a visible transaction that appears to be unconditional, whereby an innocent purchaser has been deluded, and to the great advantage of having an inflexible rule of law rather than the uncertain determination of a jury, this court is unwilling to go beyond the case of *Bennett v. Sims*. Stopping where that stopped, we held that although the condition may be binding on Williams, it did not bind a subsequent *bona fide* purchaser without notice."

The next case in which the act was referred to was that of *McCorle v. Montgomery*, 11 Rich. Eq. 152. It is true that was in reference to the somewhat analogous doctrine of the equity of the vendor as to land; but in the course of his opinion Chancellor DUNKIN

* Decided at Walterboro, June term, 1883.

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said: "While something is due to the vendor who parts with his property, not less certainly is due to the subsequent creditor who has trusted the ostensible as well as the legal owner of the estate, without any knowledge of a secret incumbrance. Upon this subject the language of Chief Justice MARSHALL in *Bayley v. Greenleaf*, 7 Wheat. 46, is instructive: 'To the world,' says he, 'the vendee appears to hold the estate, divested of any trust whatever, and credit is given to him, in the confidence that the property is his own in equity as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of the estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a Court of Chancery to the exclusion of *bona fide* creditor.' It may be added that the act of 1843, requiring all mortgages of real estate, however formal and perfect, to be recorded within sixty (now forty) days, may well be regarded as a legislative declaration of the prohibitory policy of the country against any such secret liens."

The next case in the order of time was that of *McKnight v. Gordon*, 13 Rich. Eq. 223. That was as to a condition in writing under the very section of the act involved here, in which Mr. Justice INGLES delivered an elaborate and exhaustive judgment, which is absolutely conclusive of the question here, if the paper in this case belongs to the same category as the one in that and must, as there, be regarded as an "instrument of writing in the nature of a mortgage." Upon that point we have no doubt. The paper in that case was in these words: "For the full and better securing of W. G. McKnight from all liability for which he may become indebted as my surety on my notes, etc., I have bargained, sold, and delivered unto the said W. G. McK. my two negro fellows, Bill and James, to have and to hold the same as his own right and title, until he shall have become relieved from all indebtedness incurred as security as aforesaid." In this case notes were given with the condition inserted: "This note, having been given to said Herring & Co. in part payment for the purchase thereof, and in accordance with the terms of an agreement for the purchase thereof, said Herring & Co. do not part with any title thereto until the purchase money has been fully paid." Was not this in all respect as much a mortgage as

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the bill of sale to McKnight? Here was a sale and delivery of the property, marked with the name of the purchaser, price agreed upon, and notes taken, but with a condition purporting to retain title in the property as a security for the purchase-money. It is altogether unmeaning for the parties to say that it should not amount to a sale, when the transaction exhibits every element of a sale and transfer of ownership. It seems to us that the conditional note was an "instrument of writing in the nature of a mortgage."

The next in order was the recent case of *Talmadge v. Oliver*, 14 S. C. 522, cited and relied on in the court below. That was a case in which the contract was sued upon within the time for recording, and therefore the ruling did not touch the question as to the necessity of recording. So far as reference was made to the character of the paper, it was not at all in conflict with the view here presented, but on the contrary precisely in accord with the cases above cited. The chief justice in delivering the judgment of the court, distinctly declared the conditional contract to be in the nature of a mortgage. He said: "But at all events, as to this case the agreement held by the appellant may be regarded as an equitable mortgage. It has all the elements of a mortgage. It was to secure a contract. The property was designated and the title reserved to insure the performance of the contract and it is prior in date to respondent's mortgage. True it was not recorded, and being without a witness there might have been some difficulty in having it recorded; but the action was commenced within the time allowed for recording, so that respondent had actual notice within the time. This was sufficient and supplied the place of recording," etc. The last paragraph shows conclusively that the question of recording was not in the case and the adjudication rests on that fact.

Upon the whole, considering the time and occasion of the passage of the act of 1843, the state of the law then recently announced in the case of *Bennett v. Sims*, and the policy of our law as to registry, as well as its express terms and the adjudications under it, we must conclude that it was intended to embrace such conditional sales as the one in this case, and in that way to cut up, root and branch, all secret liens whether written or verbal, in respect to the rights of subsequent creditors and purchasers for valuable consideration without notice.

The plaintiffs' "contract in the nature of a mortgage" was not recorded as required, and the only remaining question is whether

the defendant, Cannon, is entitled to the protection given to subsequent creditors and *bona fide* purchasers within the meaning of the act of 1843. It will be observed that the act embraces two distinct classes of persons, viz.: subsequent creditors and *bona fide* purchasers, which have no necessary connection with each other; and in order to claim the protection afforded, it is not necessary that a party should unite in himself the character of both; but it is enough if he can show that he is entitled to the rights of either a subsequent creditor or a *bona fide* purchaser without notice. It is conceded in the case that the safe was seized and sold under legal process issued by subsequent creditors without notice, and therefore it is unnecessary to inquire whether Izlar, the first purchaser, or Cannon to whom he sold, had actual notice of plaintiffs' claim at the time of their respective purchases. The purchase at the sheriff's sale for the benefit of suing creditors, admitted to be subsequent creditors without notice, gave to the purchaser that protection which is extended to the class to which the creditor in execution belonged, whether he, the purchaser, had actual notice or not. As was said by Mr. Associate Justice INGLIS, in the case of *McKnight v. Gordon*, *supra*: "To guarantee to one a right to sell, and deny to all others a right to buy would be solecism in law. It would be imputing folly as well as mischief to the law under such circumstances to say that it either permitted the (subsequent) creditor alone to buy or precluded him also as a purchaser with, though a creditor without notice."

But without now going into the learning upon the subject of notice to different successive purchasers of the same property, we deem it sufficient to refer the aforesaid case of *McKnight v. Gordon* for the argument and authorities upon the subject. That case is so full and clear and so exactly in point that it must be conclusive of this. It was there held that the act of 1843 protects from an unrecorded mortgage two distinct classes of purchasers at sheriff's sales: (1) Those who purchase without notice, even where the debt was contracted before the mortgage was executed; and (2) those who purchase for satisfaction of debts contracted with a subsequent creditor without notice; and here it is immaterial whether the purchaser had notice or not." We think the defendant is entitled to the protection extended to those who fall under the second class above stated, whether he or his vendor Izlar, had notice or not.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the complaint be dismissed.

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McIVER, J., concurred.

SIMPSON, C. J. I concur in this opinion on the ground that the paper in question must be regarded as a writing in the nature of a mortgage of personal property and therefore covered by the second section of the act of 1843, incorporated into the general statutes.

Judgment reversed.

KENNERTY V. ETIWAN PHOSPHATE COMPANY.

(21 S. C. 226.)

Mistake — reformation — negligence.

In the absence of mutual mistake, fraud or concealment, the court will not grant reformation of an instrument, even as between the parties, where the plaintiff executed it without reading it, it having been sent to him by his attorney, and he supposing it was a copy of a different instrument previously executed by him.

ACTION for reformation. The opinion states the case. The plaintiff had judgment below.

B. J. Whaley and A. T. Smythe, for appellant.

Robert Chisolm and B. G. Magrath, contra.

SIMPSON, C. J. John Kennerty, plaintiff, respondent, owns a farm on Charleston Neck, on which he has for years been engaged in raising vegetables, strawberries and other crops for the markets of Charleston, New York, and other places. Since he has been engaged in this business, the Etiwan Phosphate Company, defendant, appellant, has erected upon an adjoining plantation large works for manufacture of commercial fertilizers, in the preparation of which quantities of sulphuric acid are used, producing certain gases, fumes and vapors, very injurious to both vegetable and animal life, and from which great injury resulted to the respondent; on account of which he brought action against the respondent and recovered a verdict for the sum of \$2,000 and costs of suit.

From this verdict the defendant gave notice of appeal, pending which negotiations commenced between the attorneys of the respective parties for a settlement of the controversy. In the meantime additional injury had resulted to the respondent. During these

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negotiations an agreement was prepared by respondent's attorney, M. P. O'Connor, Esq., which respondent signed, in which, in consideration of the amount of the verdict and an additional sum of \$250 to be paid him, with the costs of suit and the raising by appellants of their chimneys through which the gases and vapors escaped, twenty-five feet higher than formerly, he accepted the same as satisfaction of all damages up to that time, and agreed to discontinue the action then pending. It does not appear whether this paper ever went into the possession of the appellants, or that they knew of its execution. It is stated that they never assented to it.

After this the negotiations between the attorneys continued, of which respondent alleges however that he had no knowledge, and subsequently, as alleged, respondent's attorney sent him a second paper by his (respondent's) son, who received it directly from his attorney, Mr. O'Connor, with the request that he would take it and have it signed. That the respondent supposing, as he alleges, that it was not different from the previous paper, signed and returned it to his attorney. This paper, in addition to the stipulations in the first, contained a release and waiver from all future damages resulting from the same cause of which respondent had previously complained, and a covenant under seal that he would not thereafter sue the appellant company for such damages as might or would be suffered by him in the future. This second paper was signed by the respondent, in the presence of T. Massalon and T. J. Kennerty, June 10, 1876, and at the bottom is indorsed a statement, signed by Mr. O'Connor, that said deed of release was read over again to John Kennerty, and acknowledged as his deed, in his presence, and dated June 17, 1876.

Notwithstanding these facts, the respondent avers in his complaint that he supposed the second paper was the same as the first; that he was never consulted by his attorney as to any change; that he had no knowledge as to the additional stipulations; that had he been informed thereof, he would have unhesitatingly refused to execute any such release or covenant; that he never authorized or empowered his said attorney to enter into any negotiation, or to make any settlement embracing such stipulations. He denies too that the release and covenant were ever read over to him, or that he ever knew they were contained in the paper and subsequently when he directed his present attorney, Mr. Chisolm, to bring action

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for damages still resulting to his crops, he was informed by his said attorney that defendants had such a paper. Under these circumstances, the present action was commenced, in which upon allegations as above stated he prays judgment that the said paper in the possession of and held by the defendant corporation shall be brought into court, and the release and covenant be erased therefrom, and the same be decreed to have been inserted without the authority of the respondent, and that the defendant be enjoined and prohibited from using the same to prevent the plaintiff from protecting his property from damage, etc., and for such further relief as may be proper, etc.

At the February term of the court for Charleston county, upon previous notice, a motion was made to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This motion was overruled, and defendant was granted leave to answer the complaint within twenty days. Leave was also given the plaintiff to amend his complaint. By appeal from this order, the case is now before us.

The main question presented in the appeal is, admitting the allegations to be true, are they sufficient as facts to constitute a cause of action? A cause of action, defined in a few words, is a primary right of one, either legal or equitable, invaded by another. Do the facts alleged in this case show such a right, either legal or equitable in the plaintiff, and that it has been invaded by the defendant? The right which the plaintiff claims, and for the violation of which he seeks redress, is to have a certain paper, which he acknowledges he executed, reformed by striking therefrom certain stipulations therein which he alleges he did not know the paper contained when he signed it, and also to enjoin the defendant from using it against him in its present form as a defense to such action as he may institute for the protection of his property. His purpose is to strike from this paper above referred to the release and the covenant not to sue for future damages.

To simplify the matter it is an action to reform a written instrument executed by the plaintiff to the defendant. It may be well to state here that this paper seems to have been executed in 1876; was soon thereafter placed upon record by the defendant; that the stipulations as to the payment of the money required from the defendant, and raising the chimneys of the works twenty-five feet higher than formerly, have been complied with, and no offer or

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tender by the plaintiff of the money back has been made. It is alleged however that the defendants have materially enlarged their works, and in that respect have violated the agreement. It may be further stated that some time before the present action the plaintiff brought suit to enjoin the defendant from operating their works. In this suit the paper now in question was brought into court by the plaintiff as the basis upon which he asked the equitable relief of a perpetual injunction, this paper as he supposed, having precluded him from an action on the law side of the court for damages. In this suit his complaint was dismissed upon two grounds: (1) That the action could not be maintained until the legal right upon which the relief depended was established on the law side of the court; and (2) even with such right established, or not denied, there was nothing in the case to entitle the plaintiff to be released from his covenant not to sue contained in the said paper. See 17 S. C. 411.

With these statements, we will recur to the question, do the facts alleged entitle the plaintiff to have the relief demanded, or any relief? Do they show a right on his part to have the instrument in question reformed, or to prevent the defendants from using it as a defense to any future action for damages growing out of their phosphate works, as they stood when the instrument was executed, leaving the paper as a settlement of the previous case?

The cases in which the question of relief in equity may arise in connection with an instrument in writing executed by the parties may be divided into several classes: 1. Where there is a mutual mistake as to the facts upon which it is based, or as to the terms and stipulations embraced therein. 2. Where one of the parties only is under such mistake, either of the facts or the stipulations, and such mistake has been occasioned by the fraud, deceit or imposition in any form of the other. 3. Where one of the parties only is under such mistake, and this has occurred from no fault of the other, but solely by the negligence or inattention of the first party.

In the first two classes, where the mistake is made to appear by clear and competent testimony, equity will unhesitatingly afford the necessary relief, either by reforming the paper or cancelling it as the case may require. In the third, equity will refuse its aid, except under very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to

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enforce the agreement, and this must be made to appear by competent testimony of the clearest kind; the general, and we might say the almost universal rule being, as was expressed by Chancellor DARGAN, in *Murrel v. Murrel*, 2 Strob. Eq. 148; s. c., 49 Am. Dec. 664, "that a party fully competent to protect himself, under no disability, advised as to all the circumstances by which he may be saved in his rights, or in a situation where he might by due diligence be so advised, not overreached by fraud, concealment or misapprehension, nor the victim of a mistake against which prudence might have guarded, has no right to call upon the courts to protect him." Without incumbering this opinion with extracts and quotations, we think the above principles will be found laid down by the standard authors, and in leading cases on this subject. See Story Eq. Jur., §§ 110, 127, 146, 151; Adams Eq. 171; *Andrews v. Essex Fire Ins. Co.*, 3 Mason, 10; *Nevins v. Dunlap*, 33 N. Y. 676; *Lyman v. United Ins. Co.*, 17 Johns. 373; *Sawyer v. Hovey*, 3 Allen, 334; *Murrel v. Murrel*, 2 Strob. Eq. 148. s. c., 49 Am. Dec. 664; *McDow v. Brown*, 2 S. C. 108.

To constitute a cause of action in this case, under either the first or second class, it should appear in the complaint either that there was a mutual mistake as to the contents of the paper in question, to-wit, some stipulation omitted, or inserted, without the knowledge and against the understanding of both, or that the plaintiff was so mistaken or uninformed resulting from the fraud, concealment, overreaching or imposition in some way, in whole or in part, or at least in some degree by the defendant. Now admitting the allegations stated in the complaint to be true, and giving to them the most liberal intendment allowed by the spirit of the reformed procedure, do they bring the case under either of the above classes? We think not. There is certainly no allegation of a mutual misunderstanding of what the paper contained. On the contrary, it fully appears in the complaint itself that the release of and the covenant not to sue for future damages were the very matters which the defendants desired and were negotiating to have inserted. They declined the first paper because it did not contain these stipulations.

Secondly. Do the facts stated show that the plaintiff was mistaken as to these stipulations being inserted, and that he was misled in reference thereto by the fraud, imposition, or improper conduct of the defendant in any way? There is certainly no distinct charge

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of that kind made, nor after most careful examination of the complaint, do we find a single fact stated from which it may be inferred that such a charge was intended to be made. The nearest approach to such an allegation is found in the twelfth paragraph of the complaint, where it is stated that pending the appeal in the previous case, some overtures were made by the defendant to plaintiff's attorney, M. P. O'Connor, etc. The meaning of the term overture is a proposition, an offer. Now there is nothing essentially corrupt or fraudulent in all propositions or offers, so that every one must necessarily have such a feature. This will depend upon the nature and character of the proposition or offer. Here the proposition was for a settlement of the controversy. That parties should desire to settle a litigation is not a fraudulent desire. Nor in endeavoring to bring it about, is the fact that it was made to the attorneys of the party a fraudulent act. On the contrary, such mode is in the highest degree proper; and it would be better in all cases that such mode should be observed than that the parties themselves, over the heads of their attorneys and without their knowledge, should undertake it.

It is true, the complaint alleges that the plaintiff was entirely ignorant of the insertion of these stipulations, although he had the paper in his possession, and signed it in the presence of witnesses. He also alleges that had he known of their insertion he could not have been prevailed upon under any circumstances to sign the paper. He also alleges that having signed a previous paper with no such stipulations inserted and containing only such terms as he was willing to make, and this second one being sent to him by his attorney to be signed, he supposed it was as the first and signed it without observing any change. All this may be true, but in no way connects the defendants with the mistake. The defendants knew of and desired the insertions, and made no effort nor resorted to any contrivance to conceal this fact from the plaintiff. On the contrary, the stipulations were plainly expressed in the paper which was delivered to the defendants, signed and executed by the plaintiff in the presence of witnesses, one of them the son of the plaintiff. The defendants were not present even, and there is no allegation, not the most remote, that defendants had any agency whatever in obtaining plaintiff's signature.

We have seen that the case does not fall under the head of mutual error. It is equally apparent from what we have said above that

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it does not fall under the head of a mistake occasioned by fraud, imposition, misplaced confidence, or overreaching by one party as against the other. But taking the case as stated, and giving the facts their fullest force and effect, it is one where the instrument expresses exactly what was intended by the one side but contains important insertions that the other (that other being the party who executed it) did not know were embraced; of which want of knowledge the first party had no information or suspicion, nor had any agency in producing; on the contrary had every reason to believe that the paper as executed was precisely in accordance with the understanding of both parties, and so believing has since carried it out by paying the money called for and otherwise conforming thereto.

This brings the case under the third class. Does the general rule of that class apply? Or do the facts stated rank it with the exceptions? Was the plaintiff an imbecile? Was he incompetent to protect himself? Was he laboring under any disability of mind or body? Was he unable to read? Was he in a situation where he could not have been fully advised by due diligence as to the contents of the paper? Was there any concealment or circumstances of surprise? Could not reasonable and proper prudence have guarded him against the mistake? Do the facts stated in the complaint taken as true entitle him to invoke the benefit of any or all of these pleas? If not, in the language of Chancellor DARGAN, *supra*, "he has no right to call upon the courts to protect him," because upon his own showing he has no cause of action for reformation. We do not find any fact stated in the complaint from which it may be inferred that he was excusably mistaken as to the contents of the paper which he so solemnly executed under seal and in the presence of two witnesses, and upon which the court in the exercise of equity jurisdiction can seize and afford him relief. If the plaintiff was really ignorant of the contents of the paper it was an ignorance under circumstances which even the most careless might have avoided. He had nothing to do but simply to read it. This he had full opportunity to do, and if he failed to embrace said opportunity he has no one to blame but himself.

The case presents itself in this attitude: The plaintiff has signed a paper in which he has for a consideration released certain rights and made a certain covenant. The paper has all the incidents of a solemn and deliberate execution. It is under seal and was executed

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in the presence of two witnesses, who attested the same. He now comes into court and says that he was ignorant of the fact that the release and the covenant were embraced, and the only reason he gives for this ignorance is that he had some time before this execution signed a previous paper as to the same matter in which the release and covenant were not embraced, and he supposed therefore that this second paper was the same as the first. If he thought the second was the same as the first, where was the necessity of the second paper? We have no reason to doubt but that the plaintiff is truthful in his statements. In fact, the effect of the demurrer is to admit them, and the case in that aspect may be a hard one. But we cannot adjust matters according to the hardships arising in individual cases. An attempt to administer law or equity by such a principle would produce infinite confusion, uncertainty and injustice, far beyond any compensation that might result from the relief afforded in a special case. The law is built up upon general principles, and the wisdom of the past has determined that it is much the safest to adhere to them as producing the greatest good to the greatest number, rather than undertake to relieve a present hardship in special cases. If this plaintiff is entitled to relief under the circumstances claimed, we do not see why any contract should ever be regarded as absolutely binding.

It should be observed further that the plaintiff does not ask that the paper should be entirely cancelled and the original status restored. He has received the consideration and has enjoyed it for years, but he makes no offer to return it. His purpose is to strike from the paper the part to which he objects and then allow it to remain as settlement of the previous suit. The right of action which he claims is not cancellation, with restoration of original status, but reformation and the establishment of a different contract from that which appears in the paper. Here are two distinct causes of action presented, and requiring a different state of facts. A paper may be reformed when the mutual understanding of the parties requires it, without entire cancellation and without restoration of the original status, but an entire cancellation only takes place when no valid contract has been made, and the parties are to be put back as they stood at the beginning. These are different rights, and their invasion gives rise to different causes of action, requiring in the complaint a statement of facts suited to each.

The plaintiff here does not demand a cancellation in express terms;

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whether he intended to do so, under the general prayer for such further and other relief as may be proper, we do not know. If he did however, then we say, that the facts stated in the complaint do not constitute a cause of action in that respect, especially as he makes no offer or tender to restore the original status.

[Question of practice omitted.]

It is the judgment of this court that the judgment of the Circuit Court be reversed and that the complaint below be dismissed.

Judgment reversed.

McIVER, J., concurred generally, but McGOWAN, J., only in the result.

STATE V. BERLIN.

(21 S. C. 295.)

Constitutional law — sale of intoxicating liquors — discrimination.

A statute prohibiting the sale of intoxicating liquors outside of incorporated cities, towns and villages, but permitting it in those localities, is not unconstitutional.

CONVICTION of selling intoxicating liquors without a license.
The opinion states the case.

B. J. Whaley, for appellants.

Solicitor Jervey, contra.

McIVER, J. The sole question raised by this appeal is as to the constitutionality of the first section of the act of 1880 (17 Stat. 459), incorporated in the general statutes as section 1731. Although the constitutionality of this law has been twice before affirmed by this court (*State v. Mancke*, 18 S. C. 81, and *State v. Turner*, 18 S. C. 103), yet as the counsel for the appellant seems to think that the attention of the court was not directed in the argument of those cases, to the ground upon which they now assail the constitutionality of the act, we have not been unwilling to reconsider the question.

That ground is that inasmuch as the first section of the act absolutely forbids the sale of spirituous liquors outside the limits of incorporated cities, towns and villages, while in a subsequent

section it provides for the granting of licenses to sell such liquors within the limits of incorporated cities, towns and villages, it establishes a discrimination in favor of one class of persons as against another, and is therefore in conflict with the provisions of article I, section 12, of the Constitution of this State, as well as the provisions of the fourteenth amendment of the Constitution of the United States. The provision of the twelfth section of article I, which this law is supposed to violate, is expressed in the following words: "No person shall be * * * subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances;" and the language of that portion of the fourteenth amendment, with which this law is supposed to conflict is as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellants contend that their privileges and immunities, as citizens of the United States, are abridged by the law in question which is therefore in violation of the Constitution of the United States and that the restraints and disqualifications imposed by the act upon their personal rights are in violation of the provisions of the Constitution of the State. It will be observed that the act in question makes no discrimination whatever in regard to persons or to classes of persons as such, but that it only discriminates as to localities, leaving the rights, privileges and immunities of all persons in each locality precisely the same. It must also be remembered that laws regulating the sale of spirituous liquors are to be regarded as police regulations, over which the State has absolute control, limited only by some constitutional prohibition. The State therefore, in the exercise of this police power, may pass laws absolutely prohibiting the sale of spirituous liquors, except unbroken packages while in the hands of the importer, and except perhaps where the rights of property existing at the time of the passage of the law might be destroyed, or it may throw around such traffic such restraints as in the judgment of the legislature may be most conducive to the peace and good order of society, by

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preventing the evils which might flow from an unrestrained traffic in such articles. *License* cases, 5 How. 504; *Bartemeyer v. Iowa*, 18 Wall. 129; *Heisenbrittle* ads. *City Council*, 2 McMull. 233; *City Council v. Ahrens*, 4 Strob. 241.

The practical question therefore presented in this case is, whether the legislature can, in the exercise of the police power, prescribe different regulations for the sale of spirituous liquors, in different localities within its borders. It is quite clear that regulations which might prove very effective in one locality might be found very inefficient in another; and it would seem therefore that to render the exercise of this admitted power most effective, the regulations should be adapted to the wants and conditions of the different localities to which they are to be applied. It seems to us that the rule upon this subject has been well expressed by Judge Cooley in his work on Constitutional Limitations (2d ed.), at page 390: "Laws, public in their object, may, unless express constitutional provision forbids, be either general or local in their application. * * * The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or on the other hand to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another. * * * The legislature may therefore prescribe different laws of police * * * in each distinct municipality, provided the State Constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. * * * If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." The whole matter is well summed up in a note on the same page, in the following words: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State; all that is required is, that it shall apply equally to all persons within the territorial limits described in the act.

The same principle has been recognized by the Supreme Court

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of the United States and applied to a case of a different character from that now under consideration, in *Missouri v. Lewis*, 101 U. S., 22. It seems that by the laws of Missouri, an appeal lies to the Supreme Court of that State, from a final judgment of a Circuit Court in the State, except those held for the counties of St. Charles, Lincoln, Warren and St. Louis, and the city of St. Louis, for which counties and city a separate Court of Appeals is established, called the "St. Louis Court of Appeals," and from its decisions no appeal lies to the Supreme Court, except in certain specified cases, of which the case before the court was not one. It was contended that this provision of the Missouri law was in conflict with the 14th amendment of the United States Constitution, because it denies to suitors in the courts of St. Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of the State in cases where it gives that right to suitors in the other one hundred and nine counties of the State. It was held that this provision of the Missouri law was not in conflict with the 14th amendment or any other provision of the Constitution of the United States.

Mr. Justice BRADLEY, in delivering the opinion of the court uses this language, which may well be applied to the case now under consideration: "Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may well establish one system of courts for cities and another for rural districts, one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. * * * We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. * * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not complain of a violation of the clause referred to. For as before said it has respect to persons and classes. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes in the same place under the like circumstances."

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The same principle has been applied in the State of Alabama. in *Davis v. State*, 68 Ala. 58; s. c., 44 Am. Rep. 128, where it was held that a statute making it unlawful to transport or remove cotton in the seed in certain counties, after sunset and before sunrise of the succeeding day, was not in conflict with any provision of the State or Federal Constitution.

If as we have seen, the legislature has the power to prescribe different police regulations for different localities within the territory of the State, we do not see how the law in question can be said to violate section 12 of article I of the Constitution of this State. It does not subject any person to any restraint or disqualification in regard to any personal right, to which all persons in the same locality and under the like circumstances are not subjected, but all in that locality stand precisely upon the same footing, and no one has any right to complain of any infraction of his constitutional rights. To use the language of Judge Cooley, quoted above, while it is true that the statute in question is not "equally applicable to all parts of this State," it is equally true that it does apply "equally to all persons within the territorial limits described in the act."

The judgment of this court is, that the judgment of the Circuit be affirmed.

Judgment affirmed.

INFORMATION AGAINST OLIVER.

(31 S. C. 318.)

Heldence — burden of proof — doing business without license.

On a prosecution for violating an ordinance by doing business without a license, the prosecutor need not show the absence of the license, but it is incumbent on the defendant to show that he had a license.

PROSECUTION for doing business without a license. The opinion states the case. The plaintiff had judgment below.

W. M. Thomas, for appellant.

Geo. D. Bryan, contra.

McGOWAN, J. These were informations in the City Court of Charleston for alleged violations of ordinances of the city, two for

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carrying on the business of publishing a newspaper and the other two for carrying on the business of a job-hand printer, without having paid the license required therefor. The cases involving the same points were heard together, and will be so considered; what is said in one being understood as applying to all the cases.

The report of the recorder was as follows:

[Omitted.]

From this sentence the defendant appealed to this court upon the following grounds: "1. There was no plaintiff; 2. Because the city ordinance was not proved; 3. Because the defendant was not proved 'not to have paid' for a license, or to have received none; 4. Because this license law is unconstitutional as in violation of article 1, sections 12 and 14 of the State Constitution; 5. Because the information being lodged in 1883 and the offenses alleged in 1882, another remedy was provided by the city ordinances; 6. Because the defendant having already been tried by a jury for these offenses, and verdicts rendered, he cannot be tried a second time. Exceptions five and six were properly abandoned in the argument here.

[Omitting other points.]

Third. Objection is made that it was not shown affirmatively that the defendant had not paid for a license, or had not in fact received one. There is no complaint as to the charge of the recorder. Upon the proof that the defendant had been engaged in the business as alleged, and nothing being offered by the defendant by way of defense, the recorder submitted the case to the jury with the remark "that it was a question of fact for them to determine; that if from the evidence they found that the defendant has published a newspaper, worked by hand, without a license, they would find him guilty; otherwise, not guilty." Under this charge the jury found that he had published the paper without a license, and his motion for a new trial was refused. It is simply a question as to the sufficiency of proof upon a point of fact, which as often ruled here, this court in a law case has no right to consider.

It is urged however that it appears that there was no proof whatever upon one of the main allegations of the information, and therefore the conviction must necessarily have been illegal. Can it be properly said that there was no proof in view of the presumption allowable from the character of the fact itself and the conduct of the defendant? It will be observed that the allegation is negative

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in form, that there was no regular issue in the case, that the defendant did not formally plead to the information, made no denial, and offered no proof. The information contained two allegations: That the defendant had carried on the business, and that he had not paid the license tax. The first was proved, and the defendant did not prove that he had paid the tax and taken a license.

Under these circumstances, upon whom was the *onus* of making the proof upon the subject? Was it on the State to prove that the defendant had not paid the tax, or upon the defendant, if the fact were so, to prove that he had paid it? The general rule certainly is, that he who affirms must prove, and that one is not required to prove a negative. It is true there are certain exceptions to this rule, in which the proposition, though negative in its terms, must be proved by the party who states it, and notably in that class of cases in which the plaintiff grounds his right to recover upon a negative allegation, where of course the establishment of this negative is an essential element in his case. But even in this class of cases, Mr. Greenleaf says, "it is obvious that plenary proof on the part of the affirmant can hardly be expected, and therefore it is considered sufficient if he offer such evidence, as in the absence of counter-testimony, would afford ground for presuming that the allegation is true," etc.

But even this exception does not embrace that precise class of cases to which this belongs. "But when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person, except those who are duly licensed therefor, as for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas if proof of the negative were required, the inconvenience would be very great." Greenl. Ev., § 79. Among the many cases cited in the margin to sustain the proposition is one from our own State, that of *State v. Gouing*, 1 McCord, 574, where the precise point was held that "on an indictment for retailing spirituous liquors without a license, the State need not prove that the defendant had not a license, as the defendant must prove he had one," etc.

[Omitted.]

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The judgment of this court is that the judgment of the recorder of the City Court be affirmed, and that the same judgment be regarded as entered in each of the three other cases stated in the caption herein.

Judgment affirmed.

PREGNALL V. MILLER.

(21 S. C. 385.)

Sale—for pre-existing debt—retaining possession.

Where one sells personal property for the consideration of a pre-existing debt, and for the convenience of the purchaser retains possession, such retention is not necessarily fraudulent as against creditors.

ACTION to recover personal property. The opinion states the case. The defendant had judgment below.

Hayne & Ficken, for appellants.

Bryan & Bryan, contra.

SIMPSON, C. J. On August 11, 1883, the appellants purchased from the Marine and River Phosphate Company a steam engine, with about 9,627 pounds of iron, then on a certain dredge boat lying in Ashley river, at the wharf of the said company, the consideration of the purchase being a pre-existing debt upon which the said purchase was credited. The appellants at once removed the iron from the dredge boat, but left the engine thereon for their convenience and at their risk. After this, *i. e.*, about August 27, the respondents, claiming to have purchased the plant of this Marine and River Phosphate Company, located at their works, and including the said engine, took possession of the same. This purchase was made after August 11, the time of appellants' purchase, and was also made in payment of a pre-existing debt due by said company to respondents. Under these circumstances the action below was brought by appellants against respondents for the recovery of the engine, the sole issue in the case being ownership.

The Circuit judge laid down the following legal propositions in substance, for the government of the jury: That to complete a sale of personal property there must be a payment of the purchase

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money on the one side and a delivery of the article on the other. That in such sale where the vendor continues in possession after the sale as visible owner, the sale is to be considered fraudulent and void against creditors. That in such sale where the consideration is a pre-existent debt, and property is left in the possession of the vendor the sale is null and void ; and in this case if they find that the appellants agree to buy and did buy the engine leaving it in the possession of the company, from whom thereafter the respondents bought, taking possession without notice of plaintiffs' claim, then the jury are instructed that such prior sale to appellants is null and void, and the latter sale to the respondents is good and valid and the plaintiffs cannot recover.

Under this charge the jury found for the defendants. A new trial was moved but was refused, the Circuit judge holding that a sale of personal property in payment of a pre-existing debt, the vendor retaining possession, required the implication of fraud as a legal conclusion, and therefore the verdict being in accordance with the law could not be disturbed ; and further as there was but one exception to this rule, to-wit, where the vendor remained in possession under a contract of hiring (*Pringle v. Rhame*, 10 Rich. 75), of which there being no evidence in this case, the verdict was not obnoxious to the objection that it should have been left to the jury as a matter of fact to determine the character of the possession, and especially whether any benefit or advantage accrued to the debtor as the price of preference given to the creditor.

The appeal involves the correctness of these different rulings and holdings. The main questions to be considered are, 1st. Whether as held by the Circuit judge, the retention of possession by a vendor of personal property after a sale on consideration of a pre-existing debt is *per se* fraudulent as a general rule ? 2. If so, whether the only exception thereto is where the possession is retained upon a new contract of hiring as in *Pringle v. Rhame* ?

The leading English cases upon this subject are *Twyne's case*, 3 Co., 80, and the case of *Edwards v. Harben*, 2 T. R. 587. These cases seemed to favor the principle that the mere fact of the vendor retaining possession after sale will of itself, in every such case, render such sale invalid. But this doctrine to its full extent has never been followed in all of the American courts. In Massachusetts it is held that such retention is only *prima facie* evidence of fraud and may be explained by testimony; in other words that the charac-

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ter of such possession is a question of fact. So in New Hampshire, Connecticut, New York, North Carolina, Georgia, Mississippi, Texas, Wisconsin, Arkansas, Ohio and Tennessee. See 1 Chit. Cont. (11th ed.) 571, 572, note and cases there cited. In some of the other States a contrary doctrine is held. In our State previous to *Smith v. Henry*, 1 Hill, 16, the cases seemed to hold that retention of possession was a badge of fraud, not conclusive but *prima facie*; but if the testimony proved that the sale was founded upon a valuable consideration, the sale could not be impeached except by positive fraud, want of *bona fides*. *Terry v. Belcher*, 1 Bail. 568; *Garrett v. Rhame*, 9 Rich. 407; *Guignard v. Aldrich*, 10 Rich. Eq. 253.

In *Smith v. Henry*, however, a distinction was drawn between a sale where a present consideration was advanced and a sale upon a pre-existing debt; the former being left under the principle suggested above, and the latter held fraudulent as a conclusive presumption of law, the retention of possession being regarded in law as the inducement to the sale and the cause of the preference given to the particular creditor. In this case Chancellor HARPER attempted to reconcile the conflict which seemed to exist in the previous cases by a close examination of the principle upon which it had been held in some of them, and especially the English cases *supra*, that retention of possession after sale was *per se* fraudulent. He said that this was not as some seemed to suppose, because the debtor being left in possession, he thereby obtained a credit upon the faith of property which he was not entitled to, misleading subsequent creditors. Nor was it because his antecedent creditors were lulled into a false security. But it was because the debtor had obtained some benefit to himself as the price of the preference given, evidenced by his retaining possession and using it as his own.

Such being the principle of these decisions it was urged that it did not apply necessarily to a sale where the consideration was valuable and paid down at the time because there could be no necessary inference in such case that the sale was for the benefit of the debtor, although he retained possession thereafter. Where however the sale was in consideration of a pre-existing debt extinguished thereby, and yet the debtor retained possession, the inference that the debtor had stipulated for some benefit or advantage to himself was so irresistible that in such cases such possession was held *per se* evidence of fraud. Hence the distinction which he

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drew in that case, between sales upon a present consideration advanced at the time, and sales in payment of a pre-existing debt, holding the latter invalid upon the mere fact of retention of possession by the debtor, and the former open to explanation.

Thus stood the law in this State until *Jones v. Blake*, 2 Hill Ch. 636, followed by *Pringle v. Rhame*, 10 Rich. 74, in which the court modified the stringent rule laid down in *Smith v. Henry*, as to a sale upon a pre-existing debt, with possession retained under a contract of hire. Upon examination of this case however it will be seen that this modification was not based simply on the ground that possession was retained by virtue of a contract of hiring, but because the fact of hiring showed that such retention was not the price of a preference which the vendee had obtained over other creditors, but was a *bona fide* possession obtained by the debtor, independent of the sale, and having no necessary connection therewith. Such being the fact, in applying *Jones v. Blake*, and *Pringle v. Rhame*, we must not confine ourselves to their facts, but we must look to the principle upon which they were decided. Guided by this principle we cannot say that the only exception to *Smith v. Henry* is a case of hiring; on the contrary, in every case where possession is retained, if it is not retained as a benefit to the debtor, but under an independent and subsequent *bona fide* contract, it is open to explanation.

This seems to be the law of this State, and now since *Jones v. Blake* and *Pringle v. Rhame*, whether the consideration be the payment of a pre-existing debt or a present consideration, the cases stand on the same platform, *i. e.*, the character of the possession becomes a question of fact and must be submitted to the jury, with the onus upon the vendee. Such being our conclusion as to the principle applicable to the question involved here, we think the Circuit judge was in error in holding that retention of possession after sale upon a pre-existing debt was conclusive *per se* of fraud, as a general rule, there being but one exception, *i. e.*, where the possession is founded upon a contract of hiring. We think the character of the possession in this case should have been submitted to the jury in accordance with the views hereinabove, the invalidity of the sale being dependent upon the fact whether the retention of possession of the vendor was for his benefit or the price of a preference given to the vendee.

We think 'oo that that portion of the charge of the judge in

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which he held that to complete a sale both payment of purchase money and delivery of property were necessary, was erroneous. Change of title takes place when the bargain is struck, and may pass before payment and before actual delivery; where property is sold on a credit with possession given, or where it is sold for cash and yet left with the vendor for vendee's convenience, and subject to his control, title changes and the sale is complete.

It is not necessary to consider the other questions discussed by the counsel.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the case be remanded.

Judgment reversed.

HUGUENIN V. COURTENAY.

(21 S. C. 403.)

Specific performance — destruction of subject of contract.

The plaintiff contracted to sell and the defendant to buy a leasehold interest in land to commence in the future. Before the day an ocean storm washed away part of the land. *Held*, that specific performance should not be decreed.*

ACTION for specific performance. The opinion states the case. The defendant had judgment below.

M. S. Lord, Jr., for appellant.

Byran & Byran, contra.

McIVER, J. The plaintiff seeks by this action to enforce the specific performance of a contract for the sale of a house and lot on Sullivan's island, the terms of which are to be found in the correspondence which passed between the parties. The plaintiff, by letter dated July 25, 1881, addressed to defendant's agent, says: "I hereby agree to sell you lot on front beach, Sullivan's island, belonging to me, and known as No. 16 in a rough plat of Moultrieville, and purchased by me from E. M. Jervey, March 21, 1880, for the consideration of \$300 cash; possession to be given November

* See note, 36 Am. Rep. 436.

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1, 1881, provided I can obtain the consent of the present lessee." To this letter the defendant replied by letter of same date, confirming the negotiation made by his agent, and adding these words: "I had hoped to have got immediate possession, intending to use the small building for my bathing this season; but as I will not build before November, I will arrange otherwise."

The defendant in his answer admits the making of the contract as above stated, but denies the allegation of the plaintiff, that he "has always been, and still is, ready and willing to perform the agreement on his part, and on being paid the purchase-money, to convey the said lot of land to the defendant, and to let the defendant into possession thereof from the time in the agreement specified." And he also denies the further allegation, "that on or about the first day of November the plaintiff duly offered to make title to the said land to the defendant pursuant to the agreement; but the defendant then, and ever since, has refused to accept the same and to pay the purchase money." On the contrary, the defendant avers that the plaintiff "was then, has been ever since, and is now unable to make title and convey the said lot of land to the defendant pursuant to said agreement," by reason of the fact that after the making of said agreement, and before the said first day of November, the premises in question were in part destroyed by a storm in August, 1881, and so large a part of said lot covered by the sea as to render it wholly unfit for the purposes for which defendant proposed to purchase.

On the trial below two questions were raised, one of fact and the other of law. 1. Whether the lot was injured to such an extent by the storm of August, 1881, as to render it unfit for the purposes for which the defendant proposed to purchase. 2. If so, does this relieve the defendant from the liability to perform the contract? The Circuit judge answered both of these questions in the affirmative, and accordingly rendered judgment dismissing the complaint. From this judgment the plaintiff appeals upon the several grounds set out in the record, which however substantially raise only the two questions above stated.

The first being a question of fact, we are bound, under the well-settled rule, to accept the conclusion reached by the Circuit judge, unless it is shown to be without any evidence to support it, or manifestly against the weight of the evidence. The testimony as to the extent of the injury done to the premises by the storm was certainly

conflicting, and it is quite clear that we cannot say that the conclusion reached by the Circuit judge is without any evidence to support it. Nor can we say that his conclusion was manifestly against the weight of the evidence. There was conflict in the testimony and it was for the Circuit judge to weigh it, and if the conclusion which he has reached can be supported by the testimony, we will not interfere, even though there may be other testimony in the case pointing to a different conclusion. We are not to substitute our judgment for that of the Circuit judge as to the comparative weight of the testimony, but we are simply to inquire whether manifest error has been shown. This, we think, has not been done, but on the contrary, a review of all the testimony satisfies us that the conclusion reached by the Circuit judge may well be supported. *Gary v. Burnett*, 16 S. C. 632.

This brings us to the question of law involved in the case, and the answer to that depends upon the inquiry, who was the owner of the property in question at the time the destruction or injury took place? for it is quite clear that whoever was the owner at the time must bear the loss. To solve this inquiry it is necessary for us to consider the nature of the property in question. It is conceded to be a mere leasehold estate, and not an estate of freehold. Hence the practical inquiry in this case is, whether the ownership of the property in question was transferred from the plaintiff to the defendant at the date of the contract above set forth, to-wit, July 25, 1881. According to the authorities, the title or estate in property of the character of that now under consideration does not pass until the leaseholder's term commences and he has taken, or is entitled to take, possession. The very nature of such an estate consists in use and possession, 4 Kent Com. 85; 1 Washb. Real Prop., bk. 1, ch. 10, § 1.

Now as title or estate constitutes what we understand by the term ownership, it would seem to follow, that as no title or estate passed out of the plaintiff and into the defendant at the date of the contract, inasmuch as by its terms the defendant then had no right of entry and no possession or use of the property, the ownership remained in the plaintiff, and if so, the loss must fall upon him. It is true that an estate for years may be created to commence *in futuro*, and that in such a case the lessee acquires what is called an *interesse termini*, but the title or estate, that is, the ownership, must remain in the lessor, and until the title or estate of the

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lessee commences, the property is at the risk of the lessor, because until that time he is the owner.

In this State the doctrine has been established, that "where there is a substantial destruction of the subject-matter, out of which rent is reserved in a lease for years, by an act of God, or of public enemies, the tenant may elect to rescind, and on surrendering all benefit thereunder shall be discharged from the payment of rent." *Coogan v. Parker*, 2 S. C. 259, and the cases there cited. Now if this is the rule to be applied for the relief of one whose term or estate has actually commenced, there would seem to be much stronger reason for applying the same rule for the relief of one whose term or estate has never commenced. The fact that one is a tenant and the other a purchaser can make no difference in the principle. In fact, a tenant is a purchaser of the use and possession of the demised premises for the term of his lease.

[Minor point omitted.]

We are satisfied that the plaintiff is seeking to enforce the specific performance of a contract when he himself is unable to perform his part of the agreement, and that there was therefore no error in the judgment dismissing the complaint.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

HOOPER V. COLUMBIA AND GREENVILLE RAILROAD COMPANY

(21 S. C. 541.)

Master and servant — negligence — low railroad bridge.

Where a brakeman on the top of a train, in the day-time, was struck and killed by a low bridge with which he was well acquainted, the company is not liable, although it had not erected danger signal cords. (*See note, p. 699.*)

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

S. P. Dendy and M. F. Ansel, for appellant.

John C. Haskell, contra.

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McGOWAN, J. This was an action by J. J. Hooper, as administrator of his son, Nelson T. Hooper, against the Columbia and Greenville Railroad Company for damages on account of the death of said intestate, while in the service of said company as brakeman, which as alleged was caused by their wrongful act, default and negligence in keeping up at Felton's Crossing, on their road, a bridge which was defective in being too low, and by the over-head arches of which he was killed while in the discharge of his duty. The action was brought by the administrator for the benefit of himself as the father of the other distributees of the intestate, under the act of the legislature on that subject. The defendant corporation answered, admitting the death, but insisting that there was no defect in the bridge at Felton's crossing; and that if so, such "defects were well known to the said Nelson T. Hooper, both before and up to the time of his death, and that he continued in such service for a number of months before his death for valuable consideration paid by defendants, knowing the said bridge, and if there was any danger attached to the passage of said bridge by the trains of the defendants, the said Nelson T. Hooper assumed all the risks and perils incident thereto; and these defendants deny that they are responsible for the injuries arising from any defect in said bridge, which was known to said Hooper and unknown to these defendants," etc.

The case came on for trial before Judge **KERSHAW**. It was admitted that plaintiff's intestate was struck by the over-head timbers of the bridge at Felton's crossing, on the defendant's road, and that the injuries received produced his death. It appeared from the evidence that the intestate, Nelson T. Hooper, was a brakeman on a freight train on the defendant's road, and had been for about three months, which was his first experience on a railroad; that on the morning of November 7, 1881, in a storm of wind and rain, the train running at maximum speed passed under the bridge at Felton's crossing, and soon after the conductor heard that Hooper was hurt and stopped the train. He was found dead, his face bloody; he lay across the car, and head on arms; feet toward the side of the car on right; face turned toward the front; hands in his overcoat pockets; he was found mid-way of the car, just over the door. There was a considerable cut on the back of the head just at the edge of the hair; it was a considerable gash.

It further appeared that it was the duty of a brakeman to be on

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the top of the cars. Top-brakes were not used until Dodamead was superintendent (about 1870 or 1871); before that the brakeman was on the inside of the car. The bridge at Felton's was built originally in 1857, and renewed since the war. The bridge was sixteen feet from top of rail, and the height of a South Carolina railroad car (kind in use that day) is a little over eleven feet—stated by Mr. Magee, who measured one, to be eleven feet and three and one-fourth inches—leaving between the top of the cars and the timbers about four feet and eight and three-fourths inches; “a moderate stoop would pass a man under the bridge, a sitting posture would do so, but one could not stand without being knocked off.” At that time there were no danger-cords to give warning of approach to the bridge; a negro man once before had been killed at the same place. He was not a train hand; got on the cars, stood up and was killed. It also appeared that the intestate was reared in the neighborhood, and lived with his father, the family furnishing him with clothes; that he was only about a month over twenty-one years of age, and when not engaged on the road worked for his father; that after going on the road, he had not assisted his father much in money matters, but had let him have some. He spent most of his wages for clothing, was an obedient, industrious, sober boy, getting a dollar a day as brakeman.

The company offered no evidence, but upon the close of plaintiff's, moved for a nonsuit, which the judge granted, among other things saying: “The evidence for the plaintiff showed this bridge had been in the position it then was for thirty years without any change in point of height or construction from its original place and location. I cannot see under the evidence any proof that defendants have been guilty of negligence in the building of this bridge, or in maintaining it as originally constructed by the builders of the road. On the other hand, the evidence appears to point clearly to the negligence of the deceased as at least contributory, both from his certain knowledge of the bridge from passing beneath it daily, and every time being required in order to avoid danger to incline his body, and from the fact that his face, from the location of the injury, was directed to the rear. Upon the familiar principles of law, that one who enters the service of another takes upon himself the ordinary risks incident to the employment, and that one who has contributed to the cause of the danger of which he complains cannot recover against another who also contributed to the same

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causes, either or both, and I cannot from the evidence on the part of the plaintiff avoid the conclusion that the nonsuit should be granted. * * * As to the fifth and sixth grounds of the motion for nonsuit, they are refused. I am not prepared to be the pioneer in this State in announcing as a principle of law that a parent has no beneficial interest in the life of a child after the majority of such child, or to say that in this particular case there was such a failure of proof of beneficial interest as to take the case for this reason from the jury," etc.

From this order of nonsuit the plaintiff appealed upon the following grounds:

1. "Because where there is any proof to sustain the allegation of the complaint, the question must go to the jury.
2. "The question of negligence was a mixed question of law and fact, and should have been submitted to the jury.
3. "The question of negligence should have been submitted to the jury, because it was proved that the company had notice, and knew, or ought to have known, that their bridge at Felton's crossing was too low, and dangerous to its servants and employees.
4. "The proof showing that said bridge was too low, the defendant company was liable for injuries to its employees occasioned by improper and dangerous structures if the employee was in the discharge of his duty.
5. "Under the proof, the defendant company was liable to the administrator, plaintiff, for the death of his intestate.
6. "That his honor erred in holding that the deceased was chargeable with knowledge of the dangerous condition of the bridge, it being in proof that he was young and inexperienced, and had only been in railroad service about three months, and no evidence that he was ever notified of the dangerous condition of the bridge.
7. "The question of contributory negligence, and whether the plaintiff's intestate was chargeable with knowledge of the defect in the bridge, was a question for the jury, and should have been so submitted," etc.

At common law, a right of action for a personal injury dies with the person: *Actio personalis moritur cum persona*. If death is instantaneous with the injury, no right of action accrues which can survive, according to the ancient principle that "in a civil court the death of a human being cannot be complained of as an injury, whether it results from the felonious assault or the carelessness of

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the party causing it." This was considered a defect in the law, and most of the States of the Union have passed laws upon the subject, more or less similar to the first English precedent, known as Lord Campbell's Act. Our law provides as follows :

"Section 2183. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

"Section 2184. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate," etc.

The right of the administrator to recover is precisely the same as if Nelson T. Hooper had not been killed outright, but injured, and he were now suing the company for damages. In that view, did the Circuit judge commit error in granting the nonsuit? That must depend upon the proper application of the doctrines of negligence, which most of the text-writers say is not a fact, but an inference from facts considered in connection with the law. The intestate, Hooper, was in the employment of the company as a brakeman. In such case the rule is that "while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is engaged, it is also true, on the other hand, that the employer or master impliedly contracts that he * * * will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his

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servants are engaged with a reasonable degree of safety to life and security against injury." *Snow v. Housatonic R. Co.*, 8 Allen, 444.

Taking this as a proper expression of the rule, we agree with the Circuit judge that when the road was built, the bridge at Felton's crossing was a suitable "appliance," in so far as the safety of the employees was concerned, for there was ample room to pass the train in safety, and at that time it was not made the duty of any of the employees to be on the roof outside of the cars; but in 1870 or 1871, after the bridge was built, the company required the brakemen to be on the top, and a height of bridge which was ample before might not be a suitable "appliance" under the new conditions. We are not quite sure that maintaining the bridge at its former height afterward, making it necessary for the brakeman to bend his body in order to escape injury every time the train passed under it, was a full performance of the duty imposed upon the company in regard to the safety of their employees, or was one of the ordinary risks of the employment.

But there is another principle which applies here. We think it is settled that an employee may waive the right to exact of his employer such appliances as the law in its strictness might require, and that as a general rule the acceptance of service, or remaining in the service without complaint after full knowledge of a permanent patent defect, amounts to such waiver as to that particular defect. After the change in the position of the brakeman, the bridge remained unchanged for ten years to 1881, when the intestate entered the service of the company as a brakeman, and after full knowledge of the condition of the bridge, continued in that service without complaint for three months before the accident occurred.

The principle is thus stated in *Pierce on Railroads*, at page 379: "A servant who before the injury had knowledge of the defect in the road or machinery, or who having a reasonable opportunity to inform himself, ought to have known such defects, is presumed by remaining in the company's service to have assumed the risks of such voluntary exposure of himself, and cannot recover for an injury resulting therefrom; and his knowledge has the same effect whether the company or master was informed or ignorant of such defect. This rule applies with special force, where the defect or danger is obvious to the senses. A servant who knows the defect and peril takes the risk of dangerous implements, * * * or of services

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of peculiar peril which he undertakes, and dangerous practices in which he participates; or of injuries resulting from the projecting roof of a station-house, or from bridges which are too low to allow him to ride standing upright on the top of the train, and he is ordinarily chargeable, from the fact of his entering the employment with knowledge of the height of such bridge, without notice or warning from the company," etc., citing the cases of *Owen v. N. Y. Cent. R. Co.*, 1 Lans. 108; *Baltimore & Ohio R. Co. v. Stricker*, 51 Md. 47; s. c., 34 Am. Rep. 291; *Devitt v. Pacific R. Co.*, 50 Mo. 302; and *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Penn. St. 276; s. c., 37 Am. Rep. 684.

This is certainly the general rule, but there are well recognized exceptions in which such conclusions will not "necessarily follow," as in our own case of *Lasure v. Graniteville Manuf. Co.*, 18 S. C. 278, which was an action by a laborer in the employment of the defendant company for damages on account of personal injuries received in the fall of an elevated tramway, over which he was rolling cotton from the warehouse to the mill of the defendants. The distinction is thus stated by Mr. Pierce on the page before cited: "The knowledge from which it will be presumed that the servant took the risk must be such as will put him on his guard, and mere knowledge of a defect which does not inform him of the hazard is not conclusive that he assumed the risk or was negligent. The servant has been held not to be affected with such knowledge where he had a right to suppose the defect to be temporary in its character," etc. *Snow v. Housatonic R. Co.*, *supra*. In this case the lowness of the bridge was permanent, patent, and certainly informed the intestate of the hazards incident to it.

Assuming then that the intestate took the risks incident to the condition of the bridge by his entering into the service of the company as a brakeman, and remaining in that service after he had full knowledge upon the subject, was there any proof of particular negligence on the part of the company or its agents at the time of the unfortunate accident, and which caused the same? We do not understand it to be claimed that at the time of the accident there was any such special act of negligence; and in that view there was no evidence to charge the company, whether there was or was not any want of proper care on the part of the intestate himself. It is true, the train was running fast, not however at greater speed than the maximum allowed (fifteen miles an hour) on the T. rail. It

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was running from Belton toward Walhalla, in the face of a north-east storm of wind and rain. The intestate, as brakeman, was on the top of the cars without shelter, where his duty required him to be in foul as in fair weather, and the proof seems to indicate that exposed as it was, and probably overlooking the fact that they were approaching Felton's crossing, he put his hands in his overcoat pockets, turned his back to the pelting storm and was dashed to death by the timbers of the bridge striking him on the back of the neck. However much to be regretted, we do not see, under all the circumstances, that it can be considered as other than a sad accident, the proximate cause of which was the failure of the intestate to observe the bridge, occasioned probably by his position in protecting himself from the storm.

It is however strongly pressed upon the court that there were facts involved, and they should have been left to the jury. It is true, as this court has often ruled, that a nonsuit for want of evidence should not be granted where there is any evidence to go to the jury, whose exclusive province is to decide upon the weight of conflicting testimony. But we do not understand that the meaning of this rule is that every question involving a fact must go to the jury, whether there is or is not proof to support it. If there is no conflicting evidence, and all is on one side, it may be the duty of a judge to direct a nonsuit, as it would be a nugatory thing to send such an unsupported case to the jury. *Brown v. Frost*, 2 Bay, 126; s. c., 1 Am. Dec. 633; *Hopkins v. DeGraffenreid*, 2 Bay, 441; *McCall v. Cohen*, 16 S. C. 448. A high authority expresses the principle in this form: "The judge has to say whether any facts have been established by evidence, from which negligence may be reasonably inferred; the jurors have to say whether, from these facts, when submitted to them, negligence ought to be inferred. The relevancy of evidence, and whether any exist which tends to prove, or is capable of proving negligence is for the court." *Pierce Railr.* 312.

There were no facts in the case, except as to the height of the bridge and the absence of danger cords, the employment of the intestate as brakeman on the road, and as to his knowledge of the condition of the bridge. We agree with the Circuit judge, that the proof bearing upon these facts did not, in favor of the intestate, authorize a reasonable inference of negligence on the part of the company. As to the condition of the bridge and the employ-

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ment of the intestate as brakeman there could be no doubt, and it seems to us, after making all proper allowance on account of his youth and inexperience, there could be as little as to his knowledge of the height of a bridge under which he had passed every day for three months.

This view makes it unnecessary to consider the other question, which was so fully argued at the bar, as to whether, under our statute, a parent can recover damages resulting from the death of a son, who is over the age of twenty-one years, and acting for himself. As that question is not involved in the case, we prefer to reserve our opinion.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.— In *Altes v. Railway Company*, 21 S. C. 550, it was held that where the brakeman did not know of the danger, there should not be a nonsuit. The court said: "Here the negligence charged to the defendant was the fact that the plaintiff had been placed in a position where he was exposed to a danger of which he knew nothing, and of which he was not informed by the defendant, or furnished with any means or guards to warn him of its presence, although said danger was known to the defendant when the plaintiff was employed and placed in said position. Was there a total failure of testimony as to either of these allegations? We think not. On the contrary, the slightest examination of the evidence as reported will show that there was evidence as to all of them. There was evidence as to the place of the plaintiff as brakeman. There was evidence as to the fact that the Congaree bridge was too low to allow one to stand erect on the top of a car in safety as it passed said bridge. There was evidence as to the fact that the defendant knew the height of the bridge and the danger of plaintiff's position. And there was evidence that plaintiff was uninformed as to this danger; certainly that the defendant had given him no information on the subject. These were the material allegations in the complaint, and we do not see how the Circuit judge could have granted a nonsuit in the face of the testimony without invading the province of the jury as to the facts. * * * The negligence * * * consisted in exposing the plaintiff to a danger known to the defendant, but unknown to the plaintiff, and without any information or warning to him of the presence of such danger. This was the allegation in the complaint. It was the gist of the action, and the question before the court on the motion for nonsuit was, is there any testimony as to these facts? The Circuit judge found that there was; he therefore refused the nonsuit, and we think it was properly refused."

An instruction that if a railroad company constructs a covered bridge along the line of its railroad it should build it of sufficient height so that persons employed by the railroad company as brakemen and who are required to go

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upon the top of freight trains in discharging their duty as brakemen, while going through the bridge, may pass through without danger to their personal safety; *held*, in connection with other instructions, fully stating the plaintiff's (brakeman's) duty to observe due care, to be a proper statement of the law as to the company's duty. An instruction that the law does not require of a brakeman that he should absolutely know all of the defects of construction and all the obstructions there may be along the line of the railroad, nor that he should neglect the performance of his duties as a brakeman to be on the constant lookout for such obstructions and defects which may be dangerous, *held* not to be erroneous. *Chicago, etc., R. Co. v. Johnson*, Illinois Supreme Court, January 22, 1886.

The same doctrine was held in *Baltimore and Ohio and Chicago R. Co. v. Rowan*, 104 Ind. 88, when the court said: "It is earnestly insisted by appellant's learned counsel, that appellee's complaint does not state sufficient facts to constitute a cause of action, or to show that appellant is liable to him for the injuries he received while in its service and in the proper discharge of the duties of his employment. After criticising the complaint at some length, appellant's counsel say: 'In short, setting aside a jugglery of words respecting negligence, the allegations of the complaint would fix the fellow servants of the appellee with negligence, such as would avoid liability on the part of the appellant, because the accident, on these allegations, may well be held to have been caused by the negligence of fellow servants, hence he should not recover. We repeat, there is nothing showing any thing more than a sheer assumption of risk, on the part of the appellee, which risk was not latent, and, plain to be seen, not increased.' It must be confessed that the position of appellant's counsel, in regard to the non-liability of the railroad company to its employee, in such a case as the one at bar, seems to be sustained by the decisions of the courts of last resort in several of our sister States. We cite some of these cases, as follows: *Baylor v. Delaware, etc., R. Co.*, 40 N. J. L. 23; s. c., 29 Am. Rep. 208; *Baltimore, etc., R. Co. v. Stricker*, 51 Md. 47; s. c., 34 Am. Rep. 291; *Devitt v. Pacific R.*, 50 Mo. 302; *Pittsburgh, etc., R. Co. v. Sentmeyer*, 92 Penn. St. 276, s. c., 37 Am. Rep. 684; *Clark's Adm'r v. Richmond, etc., R. Co.*, 78 Va. 709; s. c., 49 Am. Rep. 394; *Gibson v. Erie Ry. Co.*, 33 N. Y. 449; s. c., 20 Am. Rep. 552.

"In this connection we may properly note that in Beach on Contributory Negligence, section 134, in speaking of these decisions, it is vigorously said: 'If the roof or overstructure of the bridge is so low that it will strike a brakeman standing erect upon the top of his train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building and maintaining these man traps.'

"The case in hand is one of first impression in this State, and we are not concluded by any previous decision of this court. We are impressed with the opinion that appellant's counsel misapprehended the force and effect of the facts stated in appellee's complaint, and admitted to be true, as the question of their sufficiency is now presented. Stripped of the 'jugglery' of adjectives

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or qualifying words, the material facts admitted to be true were, (1) the construction and maintenance by appellant of the highway bridge over its railroad track, at an insufficient height to enable its brakemen to perform their labors and discharge their duties, without great danger and hazard to the life and personal safety of such brakemen, (2) appellant's knowledge of the insufficient height of such bridge, and that it was dangerous and unsafe for its brakemen to perform their labor and discharge their duties while passing under such bridge, (3) appellee's ignorance of the fact that the bridge was too low, and that it was dangerous for him to attempt the performance of the duty imposed on him as a brakeman by the appellant, while passing under such bridge, and (4) appellee, while in appellant's employ as brakeman, in his proper place and at his post of duty, was struck by the bridge, under which his train was running, and received the injuries described in his complaint.

"It will not do, we think, to say that these facts were not sufficient to constitute a cause of action against appellant for the recovery of such damages as appellee sustained. It seems to us that a railroad company is, and ought to be required to construct and maintain its roadway and appendages, and its overhead structures, in such manner and condition that its employees or servant can do and perform all the labors and duties required of him, with reasonable safety.

"In *Houston, etc., Ry. Co. v. Oram*, 49 Tex. 341, it was held by the Supreme Court of Texas as follows: 'It is the duty of the railroad company to use ordinary care to provide such cars, road-beds, tanks, etc., as are reasonably safe; that a failure to do this, is negligence chargeable on the company itself; and that the company is responsible in damages to an employee for an injury resulting, without his negligence, from a tank or other appendage of the road so negligently constructed as to subject the employee to unnecessary and extraordinary danger which he could not reasonably anticipate or know of, and of which he in fact was not informed.'

"Doubtless, the general rule is, as it was declared to be by Chief Justice SHAW, in the leading case of *Farwel v. Boston, etc., R. Co.*, 4 Metc. (Mass.) 49, as follows: 'He who engages in the employment of another for the performance of special duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services.' But there are well defined exceptions to this general rule, one of which arises from the obligation or duty of the master not to expose the servants while conducting his business to perils or hazards which might have been provided against by the exercise of due care and proper diligence upon the part of the master. In *Chicago, etc., R. Co. v. Swett*, 45 Ill. 197, it was held by the Supreme Court of Illinois, that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if from a defective construction of its road and appurtenances an injury happen to one of its servants, the company is liable for the injuries sustained. The same learned court has since re-affirmed the same doctrine, substantially, in *Illinois Cent R. Co. v. Welsh*, 52 Ill. 183; s. c., 4 Am. Rep. 593, and in *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298; s. c., 33 Am. Rep. 54.

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'In *Hough v. Railway Co.*, 100 U. S. 218, in speaking of the exceptions to the general rule, that a master is not liable to his servant for injuries sustained by the negligence of his fellow servants, the Supreme Court of the United States says: 'One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require. in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.' The doctrine here declared is in harmony with and supported by the recent decision of this court in the well considered case of *Ind. Car Co. v. Parker*, 100 Ind. 181."

BUCK V. MARTIN.

(21 S. C. 590.)

Partition — tenants in common — allowance for improvements.

Where a widow, at her own expense, erected buildings on unimproved land belonging to herself and her infant children, which they all enjoyed together, she should be allowed on partition for the improvements, or the improved part should be set off to her.

PARTITION. The opinion states the case.

Eugene B. Gary, for appellants.

Noble & Noble, contra.

McGOWAN, J In January, 1865, the late William Smith made a deed of gift of a tract of land (525 acres) to the widow and children of his deceased son, Thomas W., viz., the widow, Edna F., and four children, Mary E., Samuel J., Jennie F. and Thomas W. Smith. In June, 1865, the widow Edna intermarried with Benj. M. Martin, and the family went into possession of the land. There were no improvements on the place, and Mrs. Martin and her husband erected a dwelling-house and necessary out-buildings, which it is alleged enhanced its value about \$300. In 1876, Mary E., one of the children, intermarried with Lawrence K. Dantzler, and on March 28, 1881, they conveyed the interest of the said Mary E., one-fifth, to Richey & Miller, and the same was sold as their

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property under execution against them, March, 1883, and purchased by the plaintiffs, who took sheriff's title, and instituted these proceedings for partition of the land.

B. M. Martin and his wife Edna both answered, that they had put permanent improvements upon the land, paid taxes therefor, and boarded, clothed, and educated the children, for which they were entitled to compensation, amounting in the aggregate to more than the entire value of the land. The plaintiffs replied, charging waste, denying the right to compensation for improvements, claiming rents and profits on their fifth, and pleading the statute of limitations, etc.

It was referred to the master, M. L. Bonham, Jr., to hear and determine the issues. He took testimony and made report, finding as matter of fact that the improvements enhanced the value of the land \$300, and holding that the same should be allowed to Martin and wife; that Martin paid the taxes, and that he should have refunded to him what he had paid within the last six years, viz., \$96, and that the plaintiffs were not entitled to rents and profits except for the year 1883, but were entitled to partition of the land. On exceptions to the master's report, the cause came on to be heard by Judge HUDSON, who held that Martin and wife were not entitled to compensation for the improvements upon the common property, and ordered a writ of partition in the usual form to divide the land into five equal parts, recommitting the report as to the taxes paid.

From this decree Martin and wife appealed to this court upon the following exceptions: "Because his honor the presiding judge erred in sustaining plaintiffs' first exception. 2. Because the judge erred in failing to allow Mrs. Edna F. Martin compensation for improvements erected on the land described in the complaint. 3. Because the judge erred in signing a writ for the partition of the land in five equal portions."

We agree entirely with what Chancellor DARGAN said in a note to *Williman v. Holmes*, 4 Rich. Eq. 476: "The question whether compensation is to be allowed to a tenant in common, who has made improvements upon the common estate, as against his cotenant, has been attended with much difficulty. Not to allow it, when the improvements are valuable, in many cases is highly inequitable; yet no safe rule of universal application can be laid down upon the subject. For in some cases, though the improve-

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ments may add to the permanent value of the estate, it might be undesirable, inconvenient, or even ruinous, for the co-tenant, who has not concurred in the improvements, to meet his share of the expense," etc. There is no doubt about the general rule. Our cases have settled the question against the right of an improving tenant in common to the exclusive benefit of his improvements. *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Dellet v. Whitner*, Cheves Eq. 223; *Hancock v. Day*, McMull. Eq. 68; *Thompson v. Bostick*, McMull. Eq. 79.

To this rule however there are well-established exceptions, one of which is that where improvements are made by a tenant in common, who has reason to believe, and does honestly believe, that he has fee-simple title in severalty to the land so improved. In such case the tenant is allowed compensation, and if practicable, in partition the part of the land so improved will be assigned to the tenant who made the improvements, without charging him the value of said improvements; that is to say, the partition will be made without any reference to the improvements. *Williman v. Holmes*, *supra*; *Scaife v. Thomson*, 15 S. C. 337; *Annely v. DeSausure*, 17 S. C. 391; *Johnson v. Harrelson*, 18 S. C. 604.

In this last case the principle is announced by the chief justice as follows: "As a general rule, and in ordinary cases, where the co-tenants are all known and easy of access, and one moves forward without consultation with the others, and erects improvements of his own accord whether desired or not by the others, he does so at his own risk, and such improvements will not be allowed. * * * Where however improvements have been erected by a co-tenant, which add value to the common estate, and erected under circumstances which would make it a great and obvious hardship upon the improving tenant to deprive him entirely of the benefit of such improvements, throwing their whole value into the common estate for partition, the disposition of the court of equity has always been to give the improving tenant the benefit thereof as far as consistent with the equity of his co-tenants. 1 Story Eq. Jur., § 665." It seems to us that the improvements in this case were erected by the mother and her husband, "under circumstances which would make it a great and obvious hardship upon them to be deprived of the benefit of such improvements, throwing their whole value into the common estate."

We do not regard the rule that the improving co-tenant is not

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entitled to compensation as applying to the case where all the co-tenants concur in the improvements. From the peculiar circumstances of this case, we must regard it as belonging to that class of cases. It is true that the children were minors at the time the improvements were made and could not consent for themselves, but they were with their mother, and the family needed a home—indeed, it was absolutely necessary. If at the time an application had been made to the court for leave to build a little cottage on the common property as a shelter for the family, can there be a doubt that such application would have been granted by the court, acting for the children? *Ex parte Palmer*, 2 Hill Ch. 218; *Corbett v. Laurens*, 5 Rich. Eq. 316. Then we regard that done which should have been done. It was not the legal duty of the mother or her husband to support the children without the use of their shares. The possession of the mother was also the possession of the children living with her, and of course they have no just claim for rents and profits which they consumed themselves. The plaintiffs have no higher rights than Mrs. Dantzler transferred to Miller & Richey. We think the facts require us to consider the improvements as made with the concurrence of all the co-tenants, through the court acting for them.

In this view, what equity could Mrs. Dantzler or her vendee have as to more than one-fifth of the land without regard to the improvements, to which she had in no way contributed? Possibly the land may be somewhat worn by cultivation, but that was the result of supporting and rearing the family of which she was a member, and of this she certainly had no right to complain. We think this is an exceptional case, and that under the circumstances Mrs. Martin ought to have the enhanced value the improvements have given to the land, and that the same may be allowed to her without the slightest injustice to Mrs. Dantzler or any one who stands in her place by purchase of her share; that the writ of partition be so framed that the commissioners should assign, if practicable, to Mrs. Martin the portion improved, without charging her with the value of the improvements; or if the land must be sold, that the amount added to its value by the improvements shall be allowed her out of the proceeds of sale, before an equal division of the same among her and the children or those now owning their shares, the amount added to the value by the improvements to be ascertained after the sale by the master fixing the ratable proportions of their value to

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that of the entire tract of land, considered only in reference to the purchase money of the whole. *Hand v. S. & R. Co.*, 17 S. C. 220.

The judgment of this court is, that the judgment of the Circuit Court, subject to the modifications herein indicated, be affirmed.

Judgment affirmed.

WILKS V. WALKER.

(28 S. C. 103.)

Assignment for creditors — preference.

An insolvent debtor transferred all his property to one creditor, by chattel mortgage, and later by bill of sale and deed, for the benefit of such creditor and another, to the exclusion of all other creditors. *Held*, a violation of the statute forbidding preferential assignments. (*See note, p. 709.*)

ACTION for value of goods. The opinion states the case. The plaintiff had judgment below.

Patterson & Gaston, for appellants.

John M McNeal, contra.

McIVER, J. On October 5, 1882, one A. F. Kitchens, being indebted to the plaintiff in the sum \$1,543, a large portion of which had been antecedently contracted, executed a mortgage on sundry articles of personal property, including the cotton which is the subject-matter of the present controversy to secure the payment of said debt on or before the first day of January, 1883. On February 10, 1883, the said Kitchens, in consideration of said indebtedness, and of a credit of \$1,498 on the mortgage debt executed a bill of sale for the property mentioned in the mortgage of the plaintiff — all of the cotton having been ginned and packed in bales, except so much thereof as was estimated to be sufficient to pay certain agricultural liens held by Barber & Drennan, the payment of which was assumed by the plaintiff. On or about February 23, 1883, the said cotton was seized by the defendant Walker as sheriff under a warrant of attachment issued by the defendants Cousar & Son, against the said Kitchens, and upon repeated demands made therefor by the plaintiff he refused to deliver it up to the plaintiff. On April 5, 1883, the said sheriff levied upon the cotton under an exe-

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cution obtained in the case in which the above mentioned warrant had been issued, and a bond of indemnity having been executed to him by Cousar & Son, with the defendant Allen Beard as a surety, he sold the same to Cousar & Son, they being the highest bidders therefor. Whereupon this action was brought to recover the value of the said cotton.

The defendants in their answer allege that on October 5, 1882, the said Kitchens was insolvent and that plaintiff had good reason to believe that he was so, and that the transfers of property above mentioned embraced all of the personal property of said Kitchens subject to execution; and that on the same day the said Kitchens conveyed to the plaintiff all his real estate subject to execution in consideration that the plaintiff would pay an antecedent debt due to the estate of Robert Patterson by the said Kitchens, and they therefore claim that these transactions between the plaintiff and Kitchens were in violation of section 2014 of the general statutes, and therefore void.

At the trial defendant's counsel proposed to ask Kitchens, while on the stand as a witness, the following question: "What property did you own on the 5th day of October, 1882?" which, upon objection being interposed by the counsel for the plaintiff, "the presiding judge stated that he would have preferred to meet the question on a demurrer to the answer, but thought he ought to meet it in the shape he found it; that he thought the answer, if made out by the testimony, was no valid defense to the plaintiff's case and that he would treat the matter in the same way he would have done it if there had been a demurrer to the answer for want of facts sufficient to prove a defense. The point to which the question was directed, and it was so conceded, was to establish the facts set out in paragraph 7 of the answer, which transactions it was claimed constituted such an assignment as was contrary to the provisions of chapter 72, section 2014, of the general statutes of this State, and therefore void."

The Circuit judge ruled that the said question was incompetent and irrelevant under the pleadings, and refused to allow or require the witness to answer the question. After this ruling the defendants of course offered no further testimony and the plaintiff had a verdict. The sole question therefore raised by this appeal is as to the correctness of this ruling.

Treating the question as if it arose upon a demurrer to the answer

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that being the way in which it was considered by the Circuit judge, and should be by us, all of the material allegations of the answer must be taken to be true. It is there alleged that at the time of the transactions between the plaintiff and Kitchens the latter was insolvent and the former had good reason to know that fact, and that these transactions "were had and made in pursuance of an original design and intent of the said Addison F. Kitchens and John W. Wilks, determined on by them in the beginning, to transfer and assign all the property of Addison F. Kitchens, subject to execution for debt, to John W. Wilks, for the benefit of the said John W. Wilks and the estate of Robert Patterson, to the exclusion of all the other creditors of the said Addison F. Kitchens."

Assuming these allegations to be true, they amount to an admission that Kitchens and Wilks intended to effect the precise object which is declared to be illegal and absolutely null and void by section 2014 of the general statutes, which reads as follows: "Any assignment by an insolvent debtor of his or her property, for the benefit of his or her creditors, in which any preference or priority is given to any creditor or creditors of the said debtor by the terms of the said assignment over any other creditor or creditors, other than as to debts due to the public, or in which any provision or disposition of the property so assigned is made or directed, other than that the same be distributed among all creditors of the said insolvent debtor equally, in proportion to the amount of their several demands, and without preference or priority of any kind whatsoever, save only as to debts due to the public, and save only as to such creditors as may accept the terms of such assignment and execute a release of their claim against the debtor, and except as hereinafter provided, such assignment shall be absolutely null and void and of no effect whatsoever."

The manifest object of the act is to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more of his creditors to the exclusion of all others; and whether this object is sought to be effected by a formal deed of assignment, or in any other mode, can make no difference. Any other view, it seems to us, would sacrifice substance to mere form, and enable insolvent debtors, by evasion, to effect a purpose declared by statute to be unlawful. The statute is a remedial one, and should be so construed as to suppress the mischief which it was manifestly designed to prevent. It being conceded, as we have seen, that the

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object of Kitchens and Wilks was, by the means of the papers above referred to, determined on in the outset, to effect an assignment of the property of A. F. Kitchens, who was then insolvent, for the benefit of Wilks and the estate of Patterson, to the exclusion of all the other creditors of Kitchens, the transaction was in violation of the statute, and therefore void.

The judgment of this court is that the judgment of the Circuit Court be reversed and that the case be remanded to that court for a new trial.

Reversed and remanded.

MCGOWAN, J. I concur upon the additional ground that the conveyance of the land to Wilks, in consideration that he would pay the donor's debt to the Patterson estate, was substantially "an assignment" for the payment of that debt. It has none of the characteristics of a sale pure and simple, but rather of an assignment, in which priority was given to a certain creditor, to the exclusion of all others. It seems to me that if parties could escape the consequences of this just provision of the law, simply by avoiding the use of the word "assignment," the act would soon become a dead letter.

SIMPSON, C. J., dissented.

NOTE BY THE REPORTER.—SIMPSON, C. J., dissenting, in this case said: "It is not contended by the appellants that the mere fact that Kitchens preferred the plaintiff in the mortgage and bill of sale of his personal property, and that he made provision for the payment of the estate of Patterson in the sale of his real estate to the plaintiff, *per se* renders said sales invalid and void. These sales, if regarded as ordinary transactions, and governed by the common principles in such cases, if founded upon valuable considerations and *bona fide*, would be unimpeachable. It is however urged that all of these papers must be considered together as one transaction, and it is insisted that when so considered they constitute in substance an assignment for the benefit of creditors, and a preference being given therein to the plaintiff and to the estate of Patterson over other creditors, they must be held void under the express terms of the act. If this be the proper construction of these papers, then this position of appellants is well founded.

"But can such construction be sustained? Do these papers, when considered as a unity, amount to an assignment for the benefit of creditors, with a preference expressed in favor of the plaintiff and the estate of Patterson over all other creditors, and therefore in violation of section 2014 of the act? * * * Nor can it be seriously urged that these papers, when united and considered as one instrument, with the provisions in each examined as if contained in a single paper, are characterized with the form or any of the features

of a general assignment for the benefit of creditors, such an assignment as the act under consideration was intended to regulate and control.

“When these instruments are examined separately, the first is a mortgage in form and in all of its features, and was intended to secure the payment of a single debt to a single creditor; the second is an ordinary conveyance of real estate upon the consideration that the purchaser would pay a debt of the grantor to a third party, a valuable and legal consideration, and the third is a bill of sale of a portion of the property embraced in the mortgage, in payment of the debt intended to be thus secured. When taken together, they amount to a sale and conveyance by Kitchens to the plaintiff of the property therein described, upon a sufficient consideration and upon a fair and just valuation, there being no allegation that the debts secured and paid were fictitious or that the property was taken by the plaintiff at an undervalue. In an assignment for the benefit of creditors it is usual to name the creditors specifically and individually or at least to provide for them as a class, and generally an assignee is nominated and appointed, who upon accepting the appointment becomes a trustee, holding for the creditors who are *cestui que trusts*, and who are invested with rights under and by virtue of the assignment, which they must seek either through or against the assignee as the facts may require.

“Now there is not an expression in either of the papers, when considered singly or together, which indicates that it was the purpose of Kitchens to execute an assignment for the benefit of his creditors generally, under the act of assembly above. No creditors are named either individually or as a class, otherwise than as in an ordinary sale. No assignee is nominated or appointed, nor do the papers possess a single feature in form of an assignment. On the contrary, as we have already stated, nothing more appears than a sale by an insolvent debtor of his entire property to one of his creditors, in consideration of an antecedent debt due said creditor and the payment by said creditor of a debt due another creditor; the effect of which transaction, it is true, is to place the property beyond the reach of all other creditors. Such a transaction may or may not be fraudulent at common law and under the statutes of Elizabeth, dependent upon the fact of its *bona fides*, but it cannot be assailed under chapter 72 of the general statutes, as the main feature which that act requires to be present in order to be applicable is absent, *i. e.*, an assignment for the benefit of creditors.

“The appellants in their argument seem to feel the force of this position when they urge that the transaction, if not against the letter of the act, is certainly against its spirit, insisting that it is a patent evasion of the manifest purpose of the act. This may or may not be true, but yet the act is specific in its terms, and describes in well-understood and precise language the class to which its sections are intended to apply, and this court cannot enlarge its provisions by embracing other classes under the light of what may be termed the spirit of the act. This would be judicial legislation instead of judicial construction. The latter power we possess but not the former.”

Piester v. Piester.

PIESTER V. PIESTER.

(23 S. C. 139.)

Interest — after maturity.

A sealed note payable one day after date, "with interest at the rate of two per cent a month," bears that interest after maturity.*

BILL to marshal assets. The opinion states the case.

Suber & Caldwell, for R. H. Wright.

Geo. S. Mower, contra.

MCGOWAN, J. This was an action in the nature of a bill to marshal the assets of David B. Piester, who died intestate in 1873. In his life-time, November, 1869, the intestate issued a mortgage of four hundred acres of land to John T. Peterson, probate judge for Newberry county, to secure his bond as guardian of Laura Lake, and on December 21, 1869, he executed another mortgage of the same land to the said judge of probate, to secure his other bond as guardian of Robert G. Lake. The intestate had been appointed guardian of these minors, upon his own *ex parte* petition in the said Probate Court.

These mortgages were not recorded in the register's office of the county until August 7, 1872; and in the meantime, April 7, 1871, the intestate having borrowed money from Robert H. Wright, in order to secure it, executed a sealed note to him as follows: "\$400. One day after date I promise to pay to the order of R. H. Wright four hundred dollars, with interest at the rate of two per cent per month, for value received. Witness my hand and seal, 7th August, 1871. (Signed) D. B. Piester [L. s.]." Wright had no actual notice of either of the mortgages at the time he loaned the money and took the above note, or indeed until they were produced in this action in 1884. The Circuit judge ruled that the Wright note bore interest after as well as before maturity, at the rate of two per cent per month; and second, that the guardianship bonds should rank equally with the Wright note (all being specialty debts) as to the four hundred acres of land embodied in the mortgage; but that the

* See *Casteel v. Walker* (40 Ark. 117), 48 Am. Rep. 5.

guardianship bonds should, under the act of 1789, take precedence as "debts of mortgage" over the mere specialty demand of Wright, as against Piester's general estate outside of the mortgage.

The parties appeal to this court upon two grounds: *First*. That his honor, the Circuit judge, committed error in allowing interest on the Wright note after its maturity at a greater rate than seven per cent per annum. *Second*. That his honor, the Circuit judge, erred in not allowing the demand based upon the sealed note of Wright to rank equally with the guardianship bonds in regard to the general estate of the intestate Piester.

I. In regard to the interest on the Wright note, we concur with the Circuit judge that it should bear interest as specified after it fell due. It is well settled by numerous cases that in general an obligation to pay interest at any other rate than seven per cent per annum only carries that interest to the date of its maturity, unless the obligation contains an agreement of the parties that the peculiar rate shall run as well after as before maturity, if this latter is also provided for. And whether the obligation expresses such agreement is simply a matter of construction. *Langston v. R. Co.*, 2 S. C. 248; *Briggs v. Winsmith*, 10 S. C. 133; s. c., 30 Am. Rep. 46; *Sharpe v. Lee*, 14 S. C. 341.

Do the terms of the note in this case, properly construed, contain such an agreement? We think they do. The phrase "one day after date" is generally adopted to express a due note, and it seems unreasonable to suppose that the parties intended that the note should bear interest only for one day, if so much. But without putting much stress on this, it is a well-recognized rule of construction that every word, if possible, should have attached to it some meaning. The note really does not bear interest at all until the day after its date, April 8, 1871, when it fell due. There is no such expression as "interest from date," but the words are "one day after date, with interest at the rate of two per cent per month."

It is a mistake to suppose that the case of *Briggs v. Winsmith*, 10 S. C. 133; s. c., 30 Am. Rep. 46, was in this respect similar. The report of that case shows that the note was payable twelve months after date, "with interest from date at the rate of twelve per cent per annum." As this note has no such statement, the interest indicated could only begin to run on the day of its maturity. "The general rule is that when a sum is liquidated and ascertained

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and to be paid on a day certain, without any reference to the subject-matter of the contract interest is allowed from the day fixed for payment. It is a compensation by way of damages for the detention of another's money after the time at which by law or contract it should have been paid." *Schmidt v. Limehouse*, 2 Bail. 276. The words "per month" may possibly have reference only to the rate and not the time, but as we have seen, it could only be the time after the maturity of the note, the interest to accrue thereafter.

[Omitting the other point, on which]

Judgment modified.

All concur.

CITY COUNCIL OF CHARLESTON V. RYAN.

(28 S. C. 389.)

Estoppel — satisfaction of mortgage written over signature in blank.

A mortgagee indorsed his name with his seal on a mortgage, and parted with its possession. A satisfaction of the mortgage was thereafter written above his signature, without his knowledge, and duly recorded. *Held*, that an innocent subsequent purchaser was protected against the mortgage.

ACTION to test validity of title. The head-note states the case. The master in his opinion said:

"These being the facts of the case, the next inquiry is, what are the respective rights of the parties under the state of the facts, and what is the law by which they are to be determined? Let us suppose, in the first place, that the obligor of the bond and the maker of the mortgage had alleged that they were paid and satisfied, and in proof of that fact had produced them as being in his own possession, with the signature and seal of the substituted trustee indorsed in blank upon each of them. Such possession of a bond and mortgage and seal of the lawful holder would be rightly interpreted according to circumstances. If found in the possession of a third person, it would naturally be interpreted to mean that an assignment was intended to be written over such signature and seal whenever it should become necessary (and this in fact is constantly done in a thousand instances); but if found in the possession of the obligor and mortgagor, an equally fair presumption would be that

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it was evidence of payment of the bond, and that a satisfaction of the mortgage was intended to be written over such signature and seal on that security. And in fact and law the writing of either an assignment to the mortgage or of a satisfaction would equally operate to satisfy the mortgage.

“But the apparent evidence of satisfaction in the case under consideration is much stronger than in the case last supposed. What in that case might have been rightfully presumed, appeared by the records of this case to have been actually done. A certificate of the mortgage had in fact been written over the signature and seal in blank, had been duly proved for record by the affidavit of a credible and competent witness, and had been plainly recorded across the face of the record of the mortgage. And this alleged fraud (if fraud it was) had been made possible by the acts of the substituted trustee, Thomas E. Ryan, in indorsing on the mortgage his blank signature and seal in the presence of a witness, and so enabling the person intrusted by him with the possession of the mortgage, to mislead and deceive, or to permit others to mislead or deceive the plaintiffs, and to induce them to lend money on the faith of the recorded satisfaction.

“The law in such a case seems to me to be very clearly settled by authoritative decisions in this State. In the case of *State Bank v. Cox*, 11 Rich. Eq. 350, Chancellor DARGAN in his decree on Circuit, says: ‘There is no doctrine of equity jurisprudence better supported by reason as well as authority than this, that when one of two innocent persons must suffer loss, it must fall on the party who by in-caution or misplaced confidence has occasioned it, or placed it in the power of a third party to perpetrate the fraud by which the loss has happened.’ And upon appeal from this decision this doctrine of the Circuit Court was affirmed, and the appeal was dismissed; the Court of Appeals saying that whoever comes fairly by a security as Cox did in this case, in the course of business, is entitled to hold it against him who passed it, or enabled another to pass it on him. In that case a power of attorney to transfer the bank stock in question (as is customary in sales of stock) had been indorsed upon the certificate of stock in blank. It was alleged and proved, on the part of the real owner, that the blank power of attorney was so indorsed on the certificate and delivered to the holder of it, only to be delivered by him to her agent in this country to enable the latter to collect the dividends, and perhaps sell the stock whenever he

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should be so directed. The person to whom it was so delivered by her never did deliver to her agent, but pledged it to Cox & Co., to secure his own debt to them. The Court of Appeals held that this blank power of attorney to transfer enabled the person to whom it was intrusted to claim that the stock was his own property, and by pledging it to Cox & Co., to secure his debt, to deceive the lenders.

“The same doctrine was affirmed in substance in the cases of *Reynolds v. Witte*, 13 S. C. 15; s. c., 36 Am. Rep. 678; and in *Calais Steamboat Co. v. Scudder*, 2 Black, 372. See also 2 Jones Mort., § 967. Indeed, the doctrine of equity jurisprudence, so clearly stated by Chancellor DARGAN in the case of *State Bank v. Cox*, has become a stereotyped maxim of law. The application of this doctrine to the present case is so obvious that I need not dwell upon it. If there ever was a case in which the incautious and misplaced confidence of one person enabled a third person to perpetrate the fraud which has occasioned the loss, or if sanctioned would occasion the loss to an innocent lender of money, this is such a case.

“It has been argued before me upon the authority of many cases, beginning in this country with the leading case of *United States v. Nelson*, 2 Brock. 64, that the blank space over the signature and seal of the trustee in this case could not be filled by writing a satisfaction, because the satisfaction is under seal, and such a blank cannot be filled in a sealed instrument. But in all the cases cited, this rule of law was admitted to be purely technical, and upheld simply by the weight of gradually accumulating authority. And in the latter cases, notably in that of *Pence v. Arbuckle*, 22 Minn. 417, the strictness of the technical rule is largely relaxed, by invoking the doctrine of estoppel, especially in favor of innocent third parties. In this connection see also *Gourdin v. Commander*, 6 Rich. 497.

“I question also whether a satisfaction of a mortgage can be regarded as technically a sealed instrument, any more than the indorsement of a promissory note would be made a sealed instrument by writing the words ‘signed and sealed’ in the presence of a witness under the indorsement. Proof of payment of the bond would of itself operate as a satisfaction, and the register can be ordered to enter satisfaction upon such proof. And a simple receipt of payment of the bond, or the writing the words, ‘this mortgage is satisfied,’ would be a satisfaction. As conclusive, it seems to me, of the question, in the case of *State Bank v. Cox*,

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above cited, the blank power of attorney was under seal, and yet the filling up of the blank was held valid in favor of an innocent holder of the certificate of stock as a pledge. In view, indeed, of the wide-spread custom of holders of bonds and mortgages indorsing their signatures and seals thereon in blank, in the presence of a witness or witnesses, for the purpose of ready assignment, and ultimate satisfaction, many titles would be now jeopardized by now declaring such blank indorsements to be void."

Wm. M. Thomas, for appellants.

G. D. Bryan, contra.

McIVER, J. The correctness of the conclusion reached below is so satisfactorily shown by the reasoning employed and the authorities cited by Master Hanckel, confirmed and indorsed as they are by the Circuit judge, that but little is left for us to add. There can be no doubt that at the time of the issue of the fire loan bonds which constituted the consideration of the bond and mortgage under which the lot in question was sold, the records, which were the proper source for the lender to go to to obtain such information, showed that the mortgage to the trustee, which is now claimed to be a prior lien, was fully satisfied and discharged by the mortgagee, or rather by one who stood in his place. This entry of satisfaction may or may not have been fraudulently done; but, even conceding that it was fraudulent, we do not see how it could affect the rights of the city council unless they had notice of such fraud. The fact that they had such notice is negatived by the findings of the master, which are not only fully concurred in by the Circuit judge, but are likewise sustained by the evidence, and therefore, according to the well-settled rule, we are bound to conclude that the city council had no such notice.

And when to this is added the further finding of fact, equally well sustained by the evidence, that the means of making such fraudulent entry of satisfaction (if indeed it was so) was afforded by the negligence of Thomas E. Ryan, the mortgagee, there cannot be a doubt about the result; under the wise and well-settled principle of equity "that where one of two innocent parties must suffer loss, it must fall on the party who, by incautious and misplaced confidence, has occasioned it or placed it in the power of a

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third party to perpetrate the fraud by which the loss has happened." Thomas E. Ryan, being the legal owner and holder of the bond and mortgage, was the proper person to receive payment and enter satisfaction; and when he indorsed his name, under his seal, on the back of the mortgage, as the master finds that he did do, he placed it in the power of any person into whose hands the mortgage might fall to write above his name an acknowledgment of payment and a discharge of the mortgage, as was in fact done. There cannot be a doubt therefore as to whose negligence caused the loss.

[Omitting some minor considerations.]

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

NORWOOD V. FAULKNER.

(22 S. C. 367.)

Usury — commissions — interest on advances — contract — consideration.

In consideration of advances by plaintiff, who were cotton factors, defendant agreed to repay the advances with ten per cent interest, and also to ship to plaintiffs two hundred bales of cotton, to be sold on commissions, and failing so to do, to pay commissions for every bale deficient. *Held* not usurious, and supported by a sufficient consideration.

ACTION of foreclosure. The opinion states the case. The plaintiff had judgment below.

Ward & Nettles, for appellant.

Edwards & Rankin, contra.

McIVER, J. The plaintiffs, who were factors and commission merchants, doing business in the city of Charleston, entered into an agreement with the defendant, doing business in Darlington county, whereby the plaintiffs were to make advances to defendant of money and supplies to an amount not exceeding \$2,500, and the defendant agreed to repay the same with interest at the rate of ten per centum per annum; and also agreed to ship to the plaintiffs at least two hundred bales of cotton to be sold by them on the usual commissions, shown by the evidence to be \$1.25 per bale, or in default thereof to pay the like commissions on such number of

bales as he might fail to ship. To secure the performance of these stipulations the defendant executed his bond and mortgage to the plaintiffs, which constitute the cause of action in this case. It is conceded that the defendant has repaid all the advances with interest, but having shipped only fifty-one bales of cotton the action is brought to recover the amount of the stipulation commissions on the one hundred and forty-nine bales which the defendant failed to ship according to contract.

The defense is rested upon two grounds: First, that the contract, so far as the stipulation to pay commissions on the cotton not shipped is concerned, is usurious. Second, that such contract was without any consideration. The Circuit judge held otherwise and rendered judgment for the plaintiffs. From this judgment defendant appeals upon the same grounds.

First was the contract usurious? The act of 1882 (18 Stat. 35), forbids the taking of a greater rate of interest than seven per centum per annum "for the hiring, lending or use of money or other commodity," except upon contracts in writing where the parties may stipulate for a rate not exceeding ten per cent. It is incumbent therefore upon the defendant to show that the charge for commissions was for the hire, loan or use of money or other commodity, and this we think he has not shown. If this were so then the plaintiffs would be converted from factors and commission merchants into mere money lenders, and there is nothing in the evidence to warrant us in so doing. The object of the contract, so far as the plaintiffs were concerned, was not merely to secure a return of the money which they might advance, or the amounts which they might expend in the purchase of supplies shipped to the defendant, with interest on the same, but also to promote their business in which their capital was invested and to which their personal services were devoted, besides the necessary outlays in the way of store rent, clerk hire, etc. Hence the contract obligated the defendant to do two things—to refund the advances made to him with interest and to ship the stipulated amount of cotton to the plaintiffs which they had prepared themselves to take charge of and sell, and in so doing had incurred expense not only in loss of time but in money actually paid out. The plaintiffs having thus equipped themselves for business as factors and commission merchants would very naturally endeavor to take all lawful means of extending their business as such, and therefore they very

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naturally required that the defendant should not only secure them the repayment of any advances they might make with lawful interest thereon, but in order to further their primary object required the defendant also to ship them cotton, the main staple of their business. These views are fully sustained by the cases of *Matthews v. Coe*, 70 N. Y. 239 ; s. c., 26 Am. Rep. 583, and *Cockle v. Flack*, 93 U. S. 344, cited in the argument of counsel for respondents. We are satisfied therefore that there was no error on the part of the Circuit judge in holding that there was no usury in the transaction.

The only remaining inquiry is whether there was any consideration for the contract. The obligation of the defendant being under seal necessarily imported a consideration, but waiving that, we think that the Circuit judge was right in holding that "there being mutual stipulations from which benefit was expected by each, the contract was certainly not without consideration." The defendant desired the plaintiffs to sell his cotton for him in Charleston and this they agreed to do upon certain terms. In order to perform their part of the contract it was necessary for the plaintiffs to prepare themselves and hold themselves in readiness to receive and sell defendant's cotton as it was shipped to them, and necessarily involved on their part an expenditure of time and money. If the defendant incurred no liability by a failure to ship a part of the cotton which he agreed to ship to the plaintiffs, then he would incur no liability by a failure to ship any cotton at all; and if he could thus relieve himself from liability by a failure to perform his obligation, then all of the customers of the plaintiffs could do likewise and this would certainly cause damage to the plaintiffs. It is clear therefore that the defendant would be liable to the plaintiffs for any damages which they might be able to show that they had sustained by reason of the failure of the defendant to ship them the stipulated number of bales of cotton, if there had been no special contract between the parties fixing the amount of such damages. But in this case such special contract was entered into, which it is conceded in the case of *Williams v. Vance*, 9 S. C. 344 ; s. c., 30 Am. Rep. 26, was an agreement for the payment of liquidated damages and not a mere penalty to secure the performance on the part of defendant.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

ZIMMERMAN V. McMAKIN.

(28 S. C. 372.)

Slander — variance as to words charged — degree of proof

It cannot be said, as matter of law, in an action of slander, that there is any substantial difference between the words charged, "public whore," and the words proved, "whorish bitch."

It is not necessary in slander to prove the words beyond a reasonable doubt.*

ACTION of slander. The head-note shows the point. The defendant had judgment below.

Duncan & Sanders, for appellant.

Bobo & Carlisle, contra.

McIVER, J. This is an action brought by the plaintiffs to recover damages for certain slanderous words alleged to have been spoken by the wife of defendant McMakin, of and concerning the wife of the plaintiff Zimmerman. The slander alleged in the third paragraph of the complaint was in calling Mrs. Zimmerman "a public whore." In the fourth paragraph of the complaint, the slander alleged is that Mrs. Zimmerman "had sworn lies on that day before Trial Justice W. S. THOMASON, on the trial of a cause in which one B. J. McMakin was plaintiff, and Edward J. Zimmerman was defendant." The defendants demurred to the fourth paragraph of the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained. At the trial, the testimony on the part of the plaintiffs tended to show that Mrs. McMakin called Mrs. Zimmerman a "whorish bitch," with certain additional adjectives appended, much more forcible than polite, and also that she called her "an infernal, stinking whore," "a whore in most every form." On the part of the defendants, Mrs. McMakin testified that she did not use the words attributed to her above, but that she called Mrs. Zimmerman, a Moorish looking bitch or devil, she did not remember which.

The Circuit judge charged the jury that it was incumbent upon the plaintiffs "to show, by a preponderance of the evidence, beyond

* To same effect, *Welch v. Jugenheimer* (56 Iowa, 11), 41 Am. Rep. 77.

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a reasonable doubt, that the words, or at least the substance of the words alleged to have been spoken, were used by the defendant;" that if they come to the conclusion that the charge made was that Mrs. Z. was "a whorish bitch," this would not be sufficient to establish the allegation of the complaint, for those words only indicate that she had the tendencies of character of a whore, but do not necessarily import that she was a whore. But if they come to the conclusion that the words used were that she was "a stinking whore," or an "infernal stinking whore," then those words, being substantially the same as the words "public whore," would be sufficient to support the allegation in the complaint.

The jury having rendered a verdict in favor of the defendants, and they having entered judgment thereon, the plaintiffs appeal substantially on the following grounds: 1. Because of error in sustaining the demurrer. 2. Because of error in charging that the plaintiffs must prove the words as alleged in the complaint, or at least their substance, beyond a reasonable doubt. 3. Because of error in instructing the jury that the words "whorish bitch" were not sufficient to establish the allegation of the complaint.

[Omitting the first point.]

The next question is as to that portion of the charge in which the Circuit judge instructed the jury that it was incumbent on the plaintiffs "to show by a preponderance of the evidence the fact, beyond a reasonable doubt, that the words, or at least the substance of the words alleged to have been spoken, were used by the defendant." The point of the objection is that the jury were instructed that the burden was on the plaintiff, to show not only by a preponderance of the evidence, but "beyond a reasonable doubt," that the words alleged, or their substance, were spoken by the defendant. In this we think there was error, as the distinction between civil and criminal cases seems to have been overlooked. The well-settled rule in the former class of cases is, that it is sufficient for the plaintiff to establish his case by a preponderance of the evidence, and that he is not, as in criminal cases, bound to establish beyond a reasonable doubt. This long established and well-settled rule was disregarded when the jury were told that the plaintiffs must establish the words alleged, not merely by a preponderance of the evidence, but also "beyond a reasonable doubt;" and inasmuch as it seemed to be a question of great importance in the view taken by the Circuit judge, whether the words used were those testified to by

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Mrs. Z., or those testified to by other witnesses, it is not unlikely that the plaintiffs sustained prejudice from this erroneous instruction.

The only remaining inquiry is, whether there was any error in instructing the jury that if they came to the conclusion that the words "whorish bitch," and not the words "public whore," or "stinking whore," or "infernal stinking whore," were the words actually used, then the allegation of the complaint was not sustained and the action could not be maintained. There is no doubt that it is not necessary to prove the words precisely as laid in the complaint, but that it will be sufficient to prove them substantially as laid; and this rule was recognized by the Circuit judge in this case. Now the practical question in this case is whether there is any substantial difference between calling a female a public whore or calling her a whorish bitch. In Webster's Unabridged Dictionary the word "whore" is defined: "A woman who practices unlawful sexual commerce with men, especially one who does it for hire; a harlot," and the synonyms given are "harlot, courtesan, prostitute, strumpet, punk, wench, concubine." His definition of the word "whorish" is: "Resembling a whore in character or conduct; addicted to unlawful sexual pleasures; incontinent; lewd; unchaste." In Worcester's Unabridged Dictionary the word "whore" is defined: "A woman who practices illicit intercourse with men for hire; a prostitute; a harlot; a concubine; a strumpet; a punk." And his definition of the word "whorish" is "unchaste; lewd; incontinent." In view of these definitions, and in view of what we suppose would be the common understanding of such terms, we confess that we are unable to see any substantial difference between them.

But aside from this, and whatever may be the strictly correct definitions of these unsavory words, we think there was error on the part of the Circuit judge in instructing the jury as matter of law that these words were not substantially the same. In *Hogg v. Wilson*, 1 Nott & McC. 216, it is said: "Words are to be construed according to their most obvious meaning and import; and courts and juries cannot understand them differently from all the world besides. That they shall be substantially proved as charged is all that can or ought to be required. Could any person understand the words proved in this case in any other sense than as conveying a direct charge of hog stealing?" In *Sawyer v. Eifert*, 2 Nott & McC. 511; s. c., 10 Am. Dec. 633, the action was

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for slander in charging the plaintiff with having stolen iron and steel from defendant. In one count the defendant was charged with having spoken the words by way of interrogation, and in the other with having accused him directly of the larceny. The proof was that the words were spoken interrogatively. In delivering the opinion of the court, NOTT, J., said: "It is now very well settled that the words are to be construed by a court and a jury in the same manner as they were, or ought to have been, understood or construed by the person to whom they were spoken. A person may convey a charge of felony as well by way of question as by a direct allegation. And it must always be a question of construction whether such is his meaning or not. The question was therefore properly referred to the jury." In *Davis v. Johnston*, 2 Bailey, 579, it is said: "The rule in verbal slander as to the construction of words, is that they are to be understood in their ordinary and popular meaning. If words are susceptible of two meanings, one imputing a crime and the other innocent, the latter is not to be adopted and the other rejected as a matter of course. In such a case, it must be left to the jury to decide in what sense the defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words."

In *Morgan v. Livingston*, 2 Rich. 573, the words alleged to have been used in one of the counts, as imputing a charge of larceny, were: "You hired a negro to kill a beef and bring it to you; you are a sheep-killing son of a bitch; you make your living at night when honest people are abed; you get your living by sneaking about of nights; you stole a beef; you are a roguish rascal; you stole some hogs; you got some hogs dishonestly." The proof was that the words used were, "You get your living by sneaking about when other people are asleep. What did you do with the sheep you killed? Did you eat it? It was like the beef you got negroes to bring you at night. Where did you get the little wild shoats you always have in your pen?" The witness, who proved these words, was asked what he understood by them, and he replied that he understood the defendant to charge the plaintiff with stealing. The defendant appealed upon the grounds, among others, that the words proved were not those laid in the declaration; that the words proved were not actionable; and that whether the words proved impute the charge of larceny, should have been decided by the

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court, and that it was error to permit the witness to prove his understanding of the words. All of these grounds were overruled, the court saying: "It is not necessary that the words, in terms, should charge a larceny. If taking them altogether, in their popular meaning, such is the necessary inference, then there is no doubt that they are actionable. * * * But if the words were doubtful and ambiguous, the plaintiff had the right to inquire of the bystanders, how did you understand the words? And if they said they understood them as charging larceny, and such understanding might fairly have been received from the words, it would prevent a nonsuit, and make it necessary for the jury to inquire, did the defendant use the words in the offensive sense in which the hearers understood them?" In this case the language quoted above, from *Davis v. Johnston, supra*, is repeated with approval.

It seems to us therefore that the Circuit judge erred in instructing the jury, as matter of law, that the words "whorish bitch," were not substantially the same as those laid in the complaint, and that it should have been left to the jury to say whether those words were used in the sense of those contained in the complaint, and whether they substantially conveyed the same imputation.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

Reversed and remanded.

WHITMIRE V. WRIGHT.

(228 C. 446)

Dower — in leasehold lands — estoppel.

A lessee for 999 years conveyed the premises as in fee-simple. *Held*, that the grantee was not estopped to show as against his grantor's widow's claim of dower, that the grantor had but a leasehold estate.

ACTION of dower. The opinion states the facts. The plaintiff had judgment below.

Jones & Jones, for appellant.

Johnstone & Cromer, contra.

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McIVER, J. By this proceeding, originally commenced in the Court of Probate, and carried thence by appeal to the Circuit Court, the petitioner demands her dower, as the widow of Henry Whitmire, deceased, in a certain lot in the town of Newberry. Her claim is resisted by the appellant upon two grounds: 1st. That the said Henry Whitmire never had such an estate in the premises as would entitle his widow to dower, he having merely a leasehold estate therein. 2d. That the premises in question were partnership property, bought with partnership funds for partnership purposes, by the late firm of T. & H. Whitmire, and that the interest of said Henry Whitmire therein was not subject to dower, until all the debts due by said partnership have been paid, which has not yet been done.

The facts, as ascertained by the decree of the judge of probate, are as follows: On December 3, 1849, one John W. Summer conveyed, by way of lease for the term of 999 years from March 14, 1797, the said lot to a partnership of which said Henry Whitmire was a member, and on February 17, 1853, the other members of said partnership conveyed in the same way their interest in the lot to Henry Whitmire and Thomas Whitmire. On February 5, 1863, Thomas Whitmire and Henry Whitmire conveyed the said lot, in fee simple, with full warranty to Geo. D. Smith, and on February 10, 1864, Geo. D. Smith conveyed the same in fee simple, with full warranty, to Bates, Cox & Hammett. On August 4, 1866, Bates, Cox & Hammett, by a like conveyance, upon which the wives of all three of the grantors renounced their dower, conveyed the lot to Robert H. Wright and Emanuel S. Coppock, with full warranty, "except the unrenounced claim of dower of the wife of Henry Whitmire." On January 24, 1882, Coppock conveyed his interest to Robert H. Wright, the defendant, with full warranty. Henry Whitmire died in July, 1882, and this proceeding was commenced on December 2, 1882.

The judge of probate overruled both of the objections urged by the defendant, and sustained the claim of dower, and upon appeal to the Circuit Court his decree was affirmed. The defendant now appeals to this court upon the several grounds set out in the record, but from the view which we take it will not be necessary to state them specifically.

It is conceded that the right of dower does not attach to a leasehold estate, and therefore if Henry Whitmire had died before con-

veying the premises in question, there can be no doubt that his widow would not have been entitled to dower therein, inasmuch as the conveyance under which he held did not purport to convey any thing more than a leasehold estate. It is contended however by the petitioner, and such was the view taken below, that inasmuch as the deed from Thomas Whitmire and Henry Whitmire to Geo. D. Smith purported to convey the fee simple, and inasmuch as the other intermediate links in the defendant's title purported to convey the fee-simple estate, the defendant is estopped from disputing the fact that Henry Whitmire held the fee simple. To simplify the question we will consider it as if Henry Whitmire, holding as he unquestionably did under the deed from his grantors only a leasehold estate in the premises, had conveyed the same in fee simple to the defendant. The inquiry then, is whether the defendant by accepting a conveyance of the fee, is estopped from showing that his grantor held only a leasehold estate of which his widow would not be dowable.

As will be seen by an examination of chapter X of 2 Scribner on Dower, 231-252, there is no little conflict of authority upon this question; but in this State we do not find that the point has ever been distinctly adjudicated. *Gayle v. Price*, 5 Rich. L. 525, was a case in which the defendant, holding under a deed from the husband, attempted to show in defense to a claim for dower, that the husband never had the legal title, having bought the premises at sheriff's sale, but never having received a deed from the sheriff. The defense was not allowed, the court saying: "He who enters under the title of another is, in general, estopped from denying it. To this general rule there are exceptions, such as where the title of the grantor, or lessor, is determined, as in cases of life estates or leases; or where the allegation does not contest the legal estate, as in the case of a trustee conveying, and his widow claiming dower. There it may be shown that his legal estate was not such a one as of which a widow was dowable. Or where one enters under a title supposed to be good, but subsequently finds it to be bad, and *bona fide* acquires the paramount title; there he is permitted to show this, as an answer to the *prima facie* case made against him by his entry; or where a tenant in possession disclaims the title of his landlord, or buys it by a mere parol contract, and holds in his own right for the statutory period, he may show these facts as an answer to his landlord's claim." From this quotation it will be observed

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that one of the recognized exceptions to the general rule is that where the defendant enters under a title of a trustee, he may, in bar of an action for dower by the widow of such trustee, be permitted, not to dispute the legal title or right of possession of his grantor, but to show that the nature of his title was such as would not support a claim of dower. This doctrine also seems to be conceded in the case of *Plantt v. Payne*, 2 Bail. 319. Indeed we do not understand that it is anywhere denied.

Now if a defendant in dower who holds under a title from the husband, under which he has gone into possession, while not permitted to dispute the fact that his grantor had a legal title, and the right of possession, is permitted to show that the title of the husband is not of such a character as would support a claim of dower, to-wit, that though having an absolute legal title and right of possession, yet that he held such title as trustee, to which the right of dower would not attach, we do not see why, upon the same principle, the defendant in this case may not be permitted to show that though Henry Whitmire had a legal title and right of possession, yet that such title did not confer upon him an estate to which the right of dower would attach. In *Gaunt v. Wainman*, 3 Bing. N. C. 69 (32 E. C. L. Rep. 42), it was held that a defendant in dower who had taken a title from the assignees of the husband, in which the premises conveyed were described as freehold, was not estopped by that deed from showing in defense to an action for dower that the premises were leasehold. And this case seems to be recognized in *Gayle v. Price*, *supra*.

As was said by TINDAL, C. J., in *Gaunt v. Wainman*, "suppose he had bought the premises as leasehold, would the demandant be estopped to say that they were freehold?" It is quite clear that she would not, for no act or declaration of the husband, after the inchoate right of dower has once attached, can be allowed the effect of depriving the wife of the right of dower. *Tibbetts v. Langley Manufacturing Co.*, 12 S. C. 465. This is upon the ground of the want of privity between the husband and wife. She is not a party or privy to any deed he may make, and therefore is not bound or estopped by any thing therein contained; and as estoppels must be mutual, it would seem to follow that if she is not estopped from claiming dower in lands held by her husband in fee simple, by reason of a deed from him in which such lands are conveyed as a mere leasehold estate, it would seem that the rule ought to work

both ways, and her husband's grantee, to whom lands have been conveyed as freehold, should not be estopped from showing that in fact they were merely leasehold.

Indeed it seems to us, as has been shown by MARSHALL, C. J., in *Blight's Lessee v. Rochester*, 7 Wheat. 535, that it is a mistake to rest the rule, that one who enters under the title of another, conveyed by a deed poll, and not by an indenture, cannot dispute the title under which he enters, upon the doctrine of estoppel, but that the true ground upon which it rests is that it is against "the moral policy of the law." A deed poll is the act of the party making it alone, and concludes him only, while an indenture is the act of both parties, and both are concluded by it. Hence where as in this case one accepts a deed poll and goes into possession under it, he is not estopped by the terms of the deed from disputing the title under which he enters, but having gained the great advantage of possession by accepting the deed and entering under it, it would be against "the moral policy of the law," while retaining such advantage to dispute the title under which he acquired so great an advantage. Hence if one acquires possession under a lease, he cannot dispute the title of his lessor until he surrenders the possession (*Wilson* ads. *Weathersby*, 1 Nott & Mc. 373), or perhaps until he disclaims holding under his lessor's title, and retains the adverse possession for a period long enough after such disclaimer to give a title under the statute of limitations. *Willison v. Watkins*, 3 Peters, 43. Accordingly in the case of *Giles v. Pratt*, 2 Hill (S. C.), 439, it was held that one already in possession and accepting a title from another is not thereby precluded from disputing the title of such other.

This being the true ground of the rule by which one who enters under the title of another is precluded from disputing such title, we do not see how it can properly be applied in a case where the widow of the grantor is claiming from his grantee dower in the premises conveyed. His possession acquired by such a title gives him no advantage in such a contest, and there is no room for the operation of the rule. The case of *Horde v. Landrum*, 5 S. C. 213, relied on by respondent, simply decides that where land has been sold under a judgment at law upon a bond given for the purchase-money, but not under the mortgage given to secure the payment of such purchase-money, the widow may claim dower from the purchaser at such sale. This was upon the plain principle that the

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deed of the sheriff to the purchaser was in law the deed of the husband, and of course if Horde, the husband, has sold directly to Landrum, there could not be a doubt that the wife's right of dower would attach. We do not think therefore that this case is applicable to the point under consideration. Nor do we think that the case of *Pledger v. Ellerbe*, 6 Rich. 260; s. c., 60 Am. Dec. 123, as it is construed in the more recent case of *Tibbets v. Langley Manufacturing Co.*, *supra*, affords any support to the position contended for by respondent.

The position taken by respondent's counsel in his argument, that the facts of the case raise the presumption that Henry Whitmire had acquired the fee which he assumed to convey, cannot be sustained. The record shows that until February 5, 1863, all parties confessedly held the premises as leasehold, and after that date Henry Whitmire certainly could not claim by possession, for he then conveyed to another; and even assuming that he did, as it is claimed he had done some time in 1858, attempt by an informal deed to convey in fee simple to George D. Smith, and then put him into possession, that would not help the matter.

We think therefore that there was error on the part of the Circuit judge in holding that the defendant, by accepting a deed for the premises in question, purporting to convey the fee-simple title, was estopped, or in any way precluded from showing that the husband of the petitioner never had such an estate in the lot as would support her claim for dower.

Under this view of the case the other question as to the effect of the partnership character of the property cannot arise, and need not therefore be considered.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to the Court of Probate for such further proceedings as may be necessary to carry out the views herein announced.

Emory v. Hazard Powder Company.

EMORY V. HAZARD POWDER COMPANY.

(23 S. C. 478.)

Nuisance — danger to only a few — joinder of actions.

A powder magazine may be a nuisance although it affects only the plaintiff. A cause of action for damages by a nuisance may be joined with a demand for an injunction against it.

ACTION for nuisance. The opinion states the case. The plaintiff had judgment below.

McCrady, Sons & Bacot, for appellant.

Lord & Hyde, contra.

SIMPSON, C. J. The plaintiff, respondent, instituted the proceeding below, alleging as a cause of action that defendant, appellant, had erected upon its premises a powder magazine within two hundred yards of the dwelling of respondent, and within twenty-five feet of the road leading to a shipyard, in which magazine the appellant intended to keep in store large quantities of gunpowder; that said magazine was erected notwithstanding the respondent had given written notice that she objected to its location so near her dwelling.

And in the sixth paragraph of the complaint she alleged that the erection and maintaining of a powder magazine on the premises aforesaid, greatly endangered the lives of herself, her family, and servants from explosion, and also the lives and property of the public travelling on said road; and she demanded judgment: 1st. That said nuisance be removed. 2d. That she recover of the defendant \$5,000 damages caused thereby and the costs of action. The defendant answering, denied the allegation of paragraph 6; and for further defense alleged that said powder magazine was erected with the knowledge and consent of all the adjacent proprietors save the plaintiff, whose dwelling is much further removed from its site than that of one who consented to its erection.

The cause came on for trial before his honor Judge KERSHAW, at the February term for Charleston county, when the counsel for the defense moved that the plaintiff be required to elect whether she would sue for damages or for an injunction against a continuance

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of the alleged nuisance, which motion after argument was refused. The trial then proceeded ending with a verdict for the plaintiff in the sum of \$500. The defendant appealed upon the following nine exceptions :

“ I. Because his honor erred in that he refused the defendant’s motion to require the plaintiff to elect whether she would proceed for damages or for injunction.

“ II. Because his honor erred in that he allowed the plaintiff to introduce testimony as to injury to her health, claimed to have been produced by the proximity of the defendant’s powder magazine when there was no allegation in the complaint charging such injury.

“ III. Because his honor erred in that he allowed the plaintiff to introduce testimony as to the construction of the magazine and the conduct of the business when there was no allegation in the complaint that the magazine was improperly constructed or that the business was improperly conducted.

“ IV. Because his honor erred in that he refused to charge the jury as the defendant requested, ‘ that if the jury in this case find that the site of the magazine is such as to cause damage to the fewest persons, at the same time affording an accessible depot of supply, that they must find for the defendant.’

“ V. Because there was no proof that the proximity of the magazine was dangerous to the lives of the plaintiff and her family.

“ VI. Because his honor erred in that he refused to charge as the defendant requested, that the fears of the plaintiff, even though they may have been reasonable, will not create a nuisance.

“ VII. Because there was no testimony introduced on the trial to show what, if any, were the damages complained of and sustained by the plaintiff, although his honor correctly charged the jury, ‘ therefore the storing and keeping of gunpowder in a magazine properly constructed, is a lawful business, and not in itself a nuisance.’

“ VIII. Because his honor erred in that he refused to charge the jury as the defendant requested, that there being no allegation in the complaint that the magazine or powder were carelessly kept, the jury must consider the case as if it was kept with the greatest discretion and security.

“ IX. Because his honor erred in that he charged the jury as follows : ‘ If you find any thing in the case that shows a wanton or reckless disregard of the plaintiff’s rights, amounting to criminality on the part of the defendant, you might add to your verdict such

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punitive damages as you think proper to punish the defendants for such criminal acts if any;’ when there was neither prayer for punitive damages, nor proof offered at the trial of any wantonness, recklessness or criminality, nor any evidence at all introduced on the point.”

We will consider these exceptions in their order. The first is as to the form of the action. The prayer of the complaint demands two kinds of relief—one equitable and the other legal; as it is contended that the plaintiff should have been required to elect between them; *i. e.*, whether she should proceed for the removal of the nuisance, or for the recovery of damages. In other words, in the opinion of the defendant, there was a misjoinder, and on that account the action could not proceed until the plaintiff had elected. No doubt there can be a misjoinder of causes of action, and when this occurs it is objectionable, and may be met, either by demurrer, by motion to make more definite, and perhaps by motion to require the plaintiff to elect; but can there be a misjoinder of remedies demanded, liable to be assailed as on misjoinder of causes of action?

Causes of action are very often confounded with remedies; and being regarded as synonymous, the rules established with reference to the one are sometimes supposed to be applicable to the other. This however is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application of such remedies as the laws may afford. But the cause of action, and the remedy sought, are entirely different matters. The one precedes, and it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles. It is true, that the motive which prompts the action is a desire for relief, and to obtain this relief is the object of the action, and in this sense the relief sought is the cause of the action; but this is not the legal sense of the phrase “cause of action.” On the contrary, that sense is as stated above; *i. e.*, a breach of one’s legal rights.

When thus understood, and when the two are kept separate and apart as they should be, it will be seen at once, that while in some cases there may be a misjoinder, by the incorporation of two distinct causes in the same complaint, which would be subject to censure and correction, yet it does not follow therefore that the insertion

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of two or more demands for relief in the same complaint would constitute a like misjoinder, and subject to like censure and correction. On the contrary, inasmuch as oftentimes there springs from one cause of action several remedial rights, entitling the party injured to several kinds of relief, it is not only not improper to unite several demands in such cases for relief, but failing to do so, the plaintiff might fail to secure the full measure of his rights. Hence we find numerous cases in the books, where two or more demands are made in the same complaint, and especially is this so in cases where the party is entitled to both legal and equitable relief, as in the case now before the court. See Pomeroy Remedies, § 460, in which is given, as an example of this principle, the very form of action adopted below, to-wit, an action to remove a nuisance by injunction, and for damages. We think the ruling of the Circuit judge was correct, both upon principle and authority. *Simonds v. Haithcock*, 18 S. C. 604; *Davis v. Lambertson*, 56 Barb. 480; Pom. Rem. 460.

[The other exceptions omitted.]

The fourth, sixth, and eighth exceptions complain because his honor refused to charge the requests contained therein, as follows: "1. That if the jury find that the site of the magazine is such as to cause danger to the fewest persons, at the same time affording an accessible depot of supply, that they must find for the defendant." The main question in the case was one of fact, and that was whether the magazine endangered the lives of the plaintiff, her family, and servants, residing on her own premises. The judge charged that if, from the evidence, the jury found that it did, then the action could be maintained as for a nuisance. No objection was made to this portion of the charge, and if this be good law, as no doubt it is, we do not see how the judge could have modified it as requested in this exception. It is not the number of persons affected by a matter that makes it a nuisance, but it is its injurious, offensive and noxious character; and it is none the less a nuisance because it affects only one or two instead of a multitude. There may be a private as well as a public nuisance, the distinction being dependent upon the number affected, but the fact of nuisance itself does not depend upon number.

2. Because his honor refused to charge as requested, that the fears of the plaintiff, even though they may have been reasonable, will not create a nuisance. The judge charged this in substance, or at least the difference between what he directly charged and

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this request, if there be a difference, is so slight that it cannot be assigned as error. He said to the jury: "In order to establish the plaintiff's right it is necessary that they should find that either manifest damage or actual injury to the plaintiff in her person or property has resulted from the causes alleged in the complaint, and if there be neither apparent danger, nor actual damage resulting from such cause, the verdict should be for the defendant." This was in substance saying that something more was necessary than the mere fears of the plaintiff.

3. Because his honor erred in that he refused to charge as requested, "that there being no allegation in the complaint that the magazine or powder were carelessly kept, the jury must consider the case as if it were kept with the greatest discretion and security." We do not think that this conclusion followed as a matter of law, because the complaint contained no allegation of the kind suggested, not so much at least as to require the judge to charge the request as a legal proposition, especially in the face of the allegation in the complaint that plaintiff's life and that of her family and servants were in danger from the explosion of the magazine, which allowed her to introduce testimony on that subject though not specially alleged in the complaint.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

BOARD V. CITY OF DECATUR.

(64 Tex. 7.)

Municipal corporation — liability for officer's compensation.

A city having a treasurer duly appointed and qualified under the general act of incorporation, cannot defeat his right to commissions for disbursement of the municipal funds by placing them in the hands of the mayor for disbursement.

ACTION for commissions. The opinion states the point. The defendant had judgment below.

L. K. Sparkman and L. A. Crane, for appellant.

Geo. W. Trenchard and Davis & Garrett, for appellee.

STAYTON, A. J. If the facts stated in the petition are true, then the appellant was the treasurer of the city of Decatur, and the only authorized custodian of its money.

The law under which the appellee is alleged to have been incorporated provides that the treasurer of the city "shall receive and securely keep all moneys belonging to the city, and make all payments for the same upon the order of the mayor, attested by the secretary;" and to secure the faithful performance of the duties of

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this officer he is required to give bond in favor of the city in such amount and in such form as may be required by the city council, with such securities as it may approve. R. S. 365.

Thus is the city treasurer, by law, made the sole receiving and disbursing officer of the city, and thus is secured the faithful performance of his duties. If he refuses to receive from collecting officers or from other persons, fails securely to keep, or properly to disburse, the funds of the city of which he is treasurer, he breaks the conditions of his bond. The law provides that a city treasurer "for his services shall receive such compensation as shall be fixed by the city council;" and the petition alleges that it had been so fixed at two and one-half per cent on moneys received or disbursed.

It appearing from the petition that the sum of \$15,000 was received by the city and disbursed while appellant was its treasurer, the question in the case is: Could the city place its money in the hands of its mayor, and have it by him disbursed, and thereby defeat the right of the treasurer to commissions on money which ought to have been delivered to him and by him have been disbursed?

The petition alleges that the money of the city was placed in the custody of its mayor, and that it was by him disbursed, and that this was done for the purpose of preventing the treasurer from receiving the percentage on receipts and disbursements fixed as his compensation; although he was ready and willing to perform his duty in this respect, and demanded that the money should be placed in his custody.

The office of city treasurer having been created by law, his duties prescribed, and his compensation fixed, and there being a duly appointed, accepted and qualified incumbent, it is difficult to perceive upon what ground his right to compensation could be defeated by the unauthorized deposit of money, of which he was the proper custodian, with some other person, or by the disbursement of such money by any other person, even under the direction of the city council.

To the person legally holding the office belong the perquisites and emoluments attached by law to the office, as fully as does the office itself, and if the city council could not without cause deprive the incumbent of the right to exercise the powers and duties of the office, it certainly could not, by any direct or indirect course of action, deprive the incumbent of the right to receive the emolu-

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ments and perquisites which the law attaches to the office, and which give to it a value.

The course which the city council, in this case, is alleged to have pursued, was in direct violation of the spirit and letter of the law made to secure the proper custody and disbursement of moneys belonging to the city.

The law provides that such moneys shall be kept and disbursed by a person duly selected for that purpose, who is required to give security for the faithful performance of his duties; while the course pursued placed the money in the hands of an unauthorized person, for whose proper conduct, in reference to its custody and disbursement, no security whatever had been given or was required by law.

That a city council has power to impose on any of its officers duties other than those imposed by the general law is recognized in article 367, Revised Statutes, but this does not empower it to confer upon one officer the powers, duties or rights expressly conferred by law upon another.

The treasurer cannot be authorized to discharge the duties of the mayor, nor can the latter have imposed upon him the powers, duties or rights of the former.

It is urged that the right of the city treasurer to receive compensation depends upon his actual reception and disbursement of the moneys of the city, and that as he was illegally deprived of the opportunity to do so, although willing, ready and demanding the opportunity to do this, he cannot recover for the receipt and disbursement of money made by the mayor.

This is a narrow view of the question, and bases the non-liability of the city for the demand of the plaintiff upon its own wrongful act.

Such a rule we believe has never been recognized in cases of this character; but on the contrary it has been held in many cases that the salary or emolument annexed to a public office is incident to the title to the office, and not to its occupation and exercise. *People, etc., v. Oulton*, 28 Cal. 44; *People, etc., v. Smyth*, 28 Cal. 21; *Mayor, etc., v. Woodward*, 12 Heisk. 499; *Carroll v. Siebenthaler*, 37 Cal. 195; *Dolan v. Mayor*, 68 N. Y. 275; *McVeany v. Mayor*, 80 N. Y. 192; s. c., 36 Am. Rep. 600; *Auditors, etc., v. Benoit*, 20 Mich. 191.

In the case last cited, after examining cases which were cited to sustain an adverse view, the court said: "The general language

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employed in these cases, that the right to fees grows out of the rendition of services, is on all logical rules to be understood with reference to the particular facts then before the court, and cannot be applied universally, as claimed by the defense, without coming in conflict with the decision of this court in *Stadler v. Detroit*, 13 Mich. 347. We there held that a municipal corporation which had excluded a salaried officer from the performance of his duties was bound to pay him the salary. We are still, I believe, satisfied with this decision. That the right to fees does not necessarily depend upon the performance of the official duties is also declared in *Glascock v. Lyons*, 20 Ind. 3." The opinion of the court in the case further presents the reasons, based on public policy, which require that acts pertaining to a public office should be performed by the officers upon whom the duty has been imposed by law, and not by an intruder, which the mayor in the case before us was if the facts alleged be true, even though he was acting under the sanction of the city council.

That there is no difference in principle, so far as the question before us is concerned, as to the right of the appellant to recover fees and to receive a salary had there been one annexed to the office, is considered in the cases of *Glascock v. Lyons*, 20 Ind. 3; *McVeany v. Mayor*, 80 N. Y. 192; s. c., 36 Am. Rep. 600.

In the case last cited the court said: "The learned counsel for the appellant, in the case in hand, sought to distinguish between cases where the compensation was fixed by fees for the specific service rendered, and where it was by an annual salary, payable at recurring periods. We are not able to perceive such a distinction as will affect the applicability of the cases cited."

The court then examined the cases theretofore decided and cited, and held that the rule was the same whether the compensation to the officer was by salary or fees, and declared that "the difference would be only that that by salary was a fixed and certain sum, and that by fees uncertain."

There are cases holding that where salary or fees have been paid to a *de facto* officer by a municipal corporation, it is not liable, for reasons of public policy, to pay the same again to the person holding title to the office. Such was the ruling in the cases before cited from 68 and 80 N. Y.; but even in these cases it is held that if the fees or salary have not been paid to the *de facto* officer, they may be recovered by the person having the title to the office, and

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that the services of the intruder will be considered as having been rendered for the person rightfully entitled.

The views expressed lead to the conclusion that the petition states a good cause of action, and that the court erred in sustaining the demurrer, and for this action of the court below the judgment will be reversed and the cause remanded.

It is accordingly so ordered.

Reversed and remanded.

TEXAS AND PACIFIC RAILWAY COMPANY V. ROSEDALE STREET RAILWAY COMPANY.

(64 Tex. 80.)

Railroad — street through yard — horse railway through street.

A public street in a town ran through the yard of a railroad company. The town authorities granted to a street car company the right to lay and operate their track through that street. *Held*, that the street car company should not be enjoined from laying and using their track through the street in the yard.

ACTION for injunction. The opinion states the case. The defendant had judgment below.

Davis, Beall & Rogers, for appellant.

O'Neill, Hunter & Stewart, for appellee.

WATTS, J., Com. App. This is a suit by the Texas and Pacific Railway Company against the Rosedale Street Railway Company, whereby it is sought to perpetually enjoin the latter from constructing its track across the yard, sidings and track of the former, and operating its street cars thereon at a point in the city of Fort Worth where it is claimed by the appellee that the yard, sidings and track of the appellant is crossed by Jennings avenue, a public street.

Upon the trial the court below dissolved the preliminary injunction, and entered judgment dismissing the suit.

From the record it appears that the real contested issue of fact

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was as to whether Jennings avenue was a public street, and crossing the yard of the appellant at the point claimed by the appellee.

Upon that issue the evidence disclosed by the record is quite full, and in which there are seeming conflicts and contrariety. The court below however after a consideration of the evidence, found that Jennings avenue was a public street of the city, and that it extended across the yard, sidings and track of appellant at the point claimed by appellee.

There is no necessity for an extended and critical examination of the evidence for the purpose of showing that the finding of the court upon this issue is sustained by it. Several of the witnesses testified that Jennings avenue was a public street, occupying the position as claimed by appellee, and continuously used and recognized as such for a number of years previous to the acquisition of the yard by appellant, and the construction of its sidings and track thereon. That in constructing the sidings and track in 1876, appellant recognized this as a public crossing, and then established a good, wide and substantial crossing over the railroad tracks, and has maintained and kept the same in good repair ever since that time; and also erected a large sign at the place, and painted thereon in large letters the words: "Railroad Crossing," and that the same has been kept standing at the place at all times since its erection. And that for years before the construction of the railroad, as well as ever since that time, this crossing has been constantly and continuously used as a public thoroughfare.

There is also evidence in the record to the effect that the appellant, through its superintendent, some time previous to the institution of this suit, applied to the city council for the privilege of closing up Houston street, which also crossed the yard, and in consideration therefor agreed to repair and keep in good order the crossing of Main street, and any other street west of Houston street, suggesting Jennings avenue. And that the city accepted the proposition, designating Main street and Jennings avenue as the streets to be repaired by appellant. Thereupon appellant closed up the crossing on Houston street, and the same remained closed at the time of the trial.

In the further consideration of the case, it will therefore be assumed as a concluded fact that Jennings avenue is a public street in the city of Fort Worth, leading across the appellant's yard, sidings and track at the place claimed by appellee.

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It also appears from the record that appellee is a duly incorporated company, and that the city of Fort Worth is a municipal corporation. Also that previous to the bringing of this suit, the city council of Fort Worth had, by ordinance duly adopted, granted the right to appellee to construct, maintain and operate a street car line along Jennings avenue across the appellant's yard and to the southern portion of the city, which street car line was to be operated by horse power.

Upon this state of case appellant claims that as the fee to the land constituting the yard was in it, constructing, maintaining and operating the street car line would constitute such additional taking or damage to the land as would require the right of way therefor to be condemned by the exercise of the right of eminent domain.

This question has undergone thorough and critical examination in the Supreme and appellate courts of several of the States, and it seems that with the exception of one adjudicated case, they all agree that the construction and operation of a horse railway on the public streets of a city, by authority from the city government, is not such new or additional burden imposed upon the land as would entitle the owner of the fee to compensation therefor, or that it would amount to such taking or damage as would require a condemnation of the right of way. *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; s. c., 28 Am. Rep. 264; *Hobart v. Milwaukee City R. Co.*, 27 Wis. 198; *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 266; s. c., 41 Am. Rep. 561; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75; *Brown v. Duplexis*, 14 La. Ann. 842; *Elliott v. Fair Haven, etc., R. Co.*, 32 Conn. 579; *Market Street R. Co. v. Cent. R. Co.*, 51 Cal. 583; *Street Railway v. Cumminsville*, 14 Ohio St. 523. See also Cooley Const. Lim. 687.

In the case of *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404, which was by a divided court, the contrary doctrine was announced. It was maintained by a majority of the court that the construction and operation of a horse railway along a public street did constitute such additional burden as entitled the owner of the fee to compensation. But Mr. Justice MASON, in a dissenting opinion, cites cases to show that this holding by a majority of the court was in conflict with previous decisions of the Supreme Court and also the Court of Appeals of New York.

Undoubtedly the proposition previously announced is sustained by reason and the great weight of authority.

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But it is asserted that by reason of the peculiar wording of our Constitution, the authorities elsewhere have no application here. The provision is as follows: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."

By reference to the cases cited, it will be seen that some of them proceed upon the basis that the construction, etc., of a street railway along a public street works no injury to the owner of the fee. No damage, it seems to us, could be inflicted upon the owner of the fee by adding this additional mode of conveyance to those already in use upon the street, and especially where the track is properly constructed so as to occasion no special injury to others.

Streets are acquired, established and maintained for the accommodation and convenience of the inhabitants of the city and the general public. And however acquired, whether by purchase, condemnation, dedication or prescription, it is that they may be used for the convenience of the public, by the ordinary and usual modes of conveyance operated upon such streets, chief amongst which is the street railway.

With us the city authorities have the power to consent that the streets of the city may be used to a reasonable extent by street railway lines. Const., art. 10, § 7; *City Ry. Co. v. Gulf City Ry. Co.*, decided at recent Galveston term.

But aside from the questions considered, it is asserted by appellant that the operation of the proposed street car line across its yard at that point would greatly inconvenience its use of the sidings and track there. That in making up trains and switching cars from one point to another upon the yard, the passing street cars would at times necessarily impede such movements.

It must be remembered that Jennings avenue is a public street, running across the yard of appellant, and constantly used by the public as such, in and by all the usual and ordinary modes of conveyance. And doubtless the passing of wagons, drays, omnibuses and other vehicles, interferes with the operations of the company upon the sidings and track at that point, quite as much as would result from passing street cars. As long however as the street remains a public thoroughfare, appellant would not be heard to complain of such inconvenience, because these are the ordinary and usual modes of conveyance used by the public. So it may be replied the street railway is included among the usual modes of conveyance

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along the streets of the city, and although in some respects inconvenient, this must, in the interest of the general public, be acquiesced in by all parties.

As was remarked in *H. & T. C. Ry. Co. v. Wilson*, 60 Tex. 144: "It is a mistake to suppose that railway companies have the exclusive right to public crossings. There the duties of the company and public are reciprocal, and the rights of each restricted by public necessity and convenience."

Our conclusion is that the inconvenience resulting to appellant from passing street cars would not constitute grounds for an injunction.

Again, it is asserted by appellant that such use of Jennings avenue across the yard would greatly interfere with, and practically prevent, necessary and contemplated improvements by appellant, such as a round-house, machine shop, coal chute, blacksmith shop, boiler-house, etc.

Assuming that Jennings avenue was not a public thoroughfare passing across the yard, then in any proceeding by the city council to establish such thoroughfare across the yard, these necessary and contemplated improvements might be considered as good grounds of defense; or might perhaps be good grounds for an injunction. *Railroad Company v. Williamson*, 91 N. Y. 552; *Application of City of Buffalo, etc.*, 68 N. Y. 167; *Milwaukee, etc., Ry. Co. v. City of Faribault*, 23 Minn. 167.

Here however the street is, and has been, according to the finding of the court, for a long time, an established public highway, and recognized as such by appellant in the construction of its track and sidings.

Now as long as it remains a public highway, it is not perceived upon what principle appellant would have the right to interfere with it as such by the erection of the proposed improvements. The public could not be deprived of the use of the street by the erection of such improvements. And while it remains an open and established public street, it may be used by street cars as well as other vehicles.

Our conclusion is that there is no error in the judgment of the court below, and that it ought to be affirmed.

Judgment affirmed.

Roberts v. Smith.

ROBERTS V. SMITH.

(64 Tex. 94.)

Negotiable instrument — "without interest" — interest after maturity.

A note payable in six months, "without interest," bears interest from maturity.

ACTION on a note. The opinion states the point. The plaintiff had judgment below.

A. E. Wilkinson and A. C. Turner, for appellants.

Hare & Head, Woods & Wilkins and F. C. Dillard, for appellees.

WILLIE, C. J. [Omitting other points.] The note sued on was payable six months after date without interest. It is settled law that where a contract bears an agreed rate of interest from date, it will bear the same rate after maturity. But it has never been held that if a note expressly provides that it shall carry no interest from date, interest shall not be calculated upon it after maturity. It would require an express contract in plain terms to this effect, or the circumstances should clearly demand such a construction, to deprive the payee of his interest on such a contract after it became overdue. "When expressed, the words used by the parties determine their rights, and if they require construction, this is generally, if not always, in favor of interest." 2 Pars. Bills and Notes, 392.

The meaning of the present note is the same as if the words "without interest" had not been used. In that event it would have borne interest from maturity, but not from date. The parties to the note were making a settlement and agreement in which six months were to be allowed to the makers of the note to perform their part of the stipulation. It was important that the makers should have such reasonable time within which to ascertain the value of the land with which the note was to be discharged, and to make a deed for it to the payees as provided in the agreement. It must have been important to the payees that the execution of the deed should not be indefinitely postponed. These circumstances account for the insertion of the words "without interest" in the note. They were doubtless inserted to give assurance that no inter-

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est should run against the makers during the time within which they were to make the title, but not to postpone indefinitely the right of the payees to receive the deed, and at the same time deprive them of all interest upon their money during the delay. The terms of the note not proving against interest after maturity, and the circumstances of its execution not demanding that it be construed so as to deprive the plaintiffs of such interest, but quite the contrary, we think there was no error in finding for the plaintiffs the amount of interest incorporated in the judgment.

There is no error in the judgment, and it is affirmed.

Judgment affirmed.

KOHN V. WASHER.

(34 Tex. 131.)

Agency — commercial traveller — implied authority.

A commercial traveller, authorized in fact only to exhibit samples and solicit, receive and forward orders, has no implied authority to sell his samples and take pay for them.

ACTION for price of goods sold. The opinion states the case. The defendant had judgment below.

Ray & Stanley, for appellants.

WATTS, J., Com. App. Appellants employed Rex as a commercial traveller, to solicit orders for the merchandise in which they dealt as wholesale merchants, and to facilitate the business and the better to enable him to secure orders, they furnished him with samples to be exhibited to dealers in soliciting their orders. Rex sold these samples to appellees, and converted the proceeds to his own use, and in this suit by appellants to recover of the appellees the value of the samples, on the ground that Rex had no authority to make the sale, the court in effect instructed the jury that if the sale of the samples was embraced within the real or apparent scope of Rex's authority, then appellants would be bound by this sale, and could not recover in this suit.

As shown by the evidence, the extent of Rex's authority was to exhibit the samples, to solicit, receive and forward orders for mer-

chandise to the appellants, together with a statement of the financial condition of the party making the order, and if this was satisfactory, appellants filled the order and shipped the same to the party who ordered the goods.

There is no evidence in the record as to any custom or usage respecting the disposition of samples by commercial travellers.

There is no controversy as to the correctness of the law as announced by the court; as to third parties dealing with an agent of another, within the real or apparent authority of the agent as held out by the principal, that the latter will ordinarily be bound by such acts of the agent is elementary.

But it is claimed that the instruction, so far as it related to the apparent authority of Rex, was not authorized by the evidence. Now in the absence of any evidence of usage which might be considered as enlarging the authority of Rex, it would seem that the objection is well founded.

Under the circumstances the extent of his authority was to exhibit the goods as samples and not as merchandise for sale. And no apparent authority to sell the samples would exist or arise out of the nature of the agency.

It has been held that a salesman authorized to sell goods on a credit has no authority to subsequently collect the price in the name of the principal, and a payment to him will not discharge the purchaser, unless some authority to collect, beyond what is implied in the mere power to make the sale, is shown. *Seiple v. Irwin*, 30 Penn. St. 513; *Law v. Stokes*, 32 N. J. Law, 249.

In our opinion the evidence did not authorize the charge, and the evidence upon the other issues is such that this error may have been material.

Our conclusion is that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

Thorn v. Newsom.

THORN v. NEWSOM.

(64 Tex. 161.)

Deed — registration — quit-claim.

One who takes under a quit-claim deed is not protected as a *bona fide* subsequent purchaser, under the recording acts. (*See note, p. 749.*)

ACTION to recover land. The opinion states the point. The defendant had judgment below.

F. B. Sexton, for appellant.

Davis & Garnett, for appellee.

WATTS, J., Com. App. The material question presented by the record is as to the effect to be accorded to the bond for title, and the judgment thereon rendered against James Duncan and in favor of Felix Mudd. It is urged that by the terms of the bond, Mudd contracted for a quit-claim deed, and the judgment for the recovery of the land must be limited in its operation to the scope and object of the intention of the parties as expressed in the bond. As resulting from these conclusions, it is asserted that Newsom is chargeable with all defects in the chain of title under which he purchased, and affected to the same extent by unrecorded conveyances and outstanding equities, as was his vendor, Mudd, who it is claimed, held under a quit-claim title only.

While non-registered deeds are declared void by the statute as to subsequent purchasers for value and without notice, still the doctrine is well settled that a subsequent purchaser, although for value and without actual notice, who takes under strictly a quit-claim deed, that is, one by which the chance of title, and not the land itself, is conveyed, will not be accorded the protection of the statute, for the obvious reason that he contracted for the interest only that his vendor then had in the land. If the vendor had previously divested himself of the title to a portion or all of the land, to the extent of the divestiture there would be no right remaining in the vendor to pass by the quit-claim to the vendee. It is the then interest of the vendor for which he contracts, and it is to such interest only that he is entitled under the quit-claim deed.

In this case it is not necessary to determine whether a vendee who purchases from one holding under a quit-claim deed, pays value, and takes a conveyance of the land with covenants of general warranty, without actual notice of an unrecorded deed existing prior to the execution of the quit-claim deed to his vendor, would be protected by the statute as a subsequent purchaser for value and without notice. Because it will be seen from an examination of the terms of the bond for title that it is questionable whether the contract was for the chance of title or for an absolute conveyance of the land.

And in the determination of that question resort should be had to the circumstances attending the transaction, the primary object being to arrive at the intention of the contracting parties. For if their intention was that the one purchased and the other intended only to sell his interest in the land then it would be held that the bond called only for a quit-claim deed. On the other hand if the obligee intended to contract for an absolute conveyance of the land and the obligor intended to bind himself to make that character of conveyance even though it was upon special warranty, nevertheless it would be a conveyance of the land as distinguished from a release or transfer of merely the obligor's right. *Harrison v. Boring*, 44 Tex. 263; *Van Rensselaer v. Kearney*, 11 How. 322; *Sweet v. Green*, 1 Paige Ch. 476 ; s. c., 19 Am. Dec. 442.

That was a practical question for the consideration of the court in the suit by Mudd upon the bond. And the judgment there was for the recovery of the land, not merely the interest that James Duncan had in it. By the statute then in force the court had full authority to pass the title by the decree. P. D., art. 1481. Such evidently was the intention of the court and such is the effect of the decree rendered.

Hence it appears that the construction placed by the court upon the bond for title was that it called for an absolute conveyance of the land. And it was not material to inquire whether the court did or did not err in that construction of the bond ; for as it had jurisdiction both of the person and subject-matter, so long as that remains a subsisting decree, it is not subject to collateral attack on the ground of error, and will constitute the evidence of Mudd's title and upon which appellee had the right to rely.

It appears from the evidence that appellee paid full value for the land. The transfer of the small note to an innocent third party, and the recovery of a judgment thereon against appellee fastens

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upon him the liability and in the contemplation of law is equivalent to a payment by him.

Appellee testified that he purchased the land in good faith and without notice of any adverse claim whatever and that he paid a valuable consideration for the same.

There is nothing in the record that militates against his evidence; on the contrary he is supported by the statements of other witnesses.

Upon that issue the court instructed the jury that if appellee purchased the land in good faith and for value without notice of the claim of appellants, and could not have known of it by exercise of ordinary diligence, then to find for appellee. But if appellee knew of the claim of appellants, or by the exercise of ordinary diligence might have known, then to find for appellants.

In our opinion the particular issue was properly submitted by the court and that the verdict is sustained by the evidence; while the charges asked by appellants and refused by the court assumed that appellee was chargeable with constructive notice of the adverse claim, which as has been seen is not true. Therefore the court did not err in refusing these instructions.

All the other questions relate to immaterial matter, which could not have had any effect upon the result.

Our conclusion is that the judgment ought to be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—Consult *Taylor v. Harrison*, 47 Tex. 451; s. c., 26 Am. Rep. 804; *Brown v. Banner, etc., Co.*, 97 Ill. 214; s. c., 37 Am. Rep. 105; *Fox v. Hall*, 74 Mo. 815; s. c., 41 Am. Rep. 816.

As to the effect of quit-claim deeds it may be laid down as a general proposition that land may be conveyed in fee simple by a deed of quit-claim. This was true at common law. It is true under the decisions of most, if not all, of the United States. See 3 Washb. Real Prop. (3d ed.) 809, 811, 830; *Hall v. Ashby*, 9 Ohio, 96; s. c., 34 Am. Dec. 424. But it seems that an evident intent on the part of the grantor to convey the land in fee must appear. See 3 Washb. Real Prop. (3d ed.) 831; Wms. Real Prop. (5th ed.) 200. In this connection Washburne expressly says that a mere naked release to one not in possession of or having a vested interest in the premises would be void. 3 Washb. Real Prop. (3d ed.) 831; Wms. Real Prop. (5th ed.) 200.

It is provided by statute in Mississippi that a deed of quit-claim and release shall be sufficient to pass all the estate which the grantor could lawfully convey. *Kerr v. Freeman*, 88 Miss. 292. This was a suit brought to remove a cloud on a title to real estate held under a quit-claim deed. It was held that under the statute last above referred to a quit-claim deed would transfer the whole interest of the releasor; but that it implied a doubtful title in the per-

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son executing it, and would be treated as passing only a doubtful title, and that therefore the complainant was not entitled to relief.

It is provided by statute in Missouri that if a person not possessed of the legal estate in the land sells the land to another, and conveys the same by a deed "purporting to convey an estate in fee simple absolute," and said person so selling afterward became possessed of the legal estate in said land, his title shall inure to the benefit of his grantee. In *Bogy v. Shoab*, 13 Mo. 380, it was determined that a quit-claim deed was not one purporting to pass the fee simple absolute under said statute.

In *Bayer v. Cockerill*, 8 Kans. 282, where a deed "remised, released and quit-claimed" certain real estate, portions of which the grantor had previously sold to a third person, but for which no deed had been delivered, it was held that the conveyance was nothing more than a quit-claim, and that only the actual interest which the grantor had at the time was conveyed. It is to be noted however that in this case there was some evidence showing that the grantee or releasee in the quit-claim deed had notice of the prior sales.

The decisions in California are somewhat conflicting. *Carpentier v. Williamson*, 25 Cal. 158, held that an ordinary quit-claim deed is sufficient to pass any estate. But in *Touchard v. Crow*, 20 Cal. 150, Chief Justice FIELD said that the operative words in a simple quit-claim deed are "remit, release and quit-claim," and held that where the words "bargain, sell and quit-claim" are employed, they operate not merely to release, but to transfer any interest which the grantor may have. *Branham v. Mayor*, 24 Cal. 606, declared that a mere release, unless the release is in possession, is void.

Marden v. Chase, 32 Me. 829, holds that the intention of the grantor expressed in a deed, in the absence of formal words, compels such construction as will give the deed effect.

The following is the statutory provision of Massachusetts: "A deed of quit-claim and release of the form in common use in this State shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." This statute is construed in the following cases: "In *Pray v. Pierce*, 7 Mass. 381, it was held that a release to one not in possession, for a valuable consideration, will be construed to be any other lawful conveyance by which the estate might pass. The court in its opinion said: "It is true the estate could not pass by way of release. But the deed purports to be a conveyance of land for a valuable consideration. * * * The conveyance must be construed to be a * * * conveyance by which the estate might pass." In this case there was a consideration of £300, and the deed contained a covenant of warranty. In *Russell v. Coffin*, 8 Pick. 148, the court held a deed of quit-claim to be sufficient to pass the estate, and said: "The proposition that a mere release of a right to one not seized or in possession of the estate, passes nothing as a release, cannot be contested, but this doctrine has been qualified, and the broad principle that deeds shall be so construed as to pass an estate when such was the intention, is recognized in the modern digests. The principle in this case is the same as in *Pray v. Pierce*, *supra*. That principle is that where it is apparent that there was an intention in the grantor to convey and the grantee to take, a quit-claim deed will not operate for that purpose.

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In *McConnell v. Reed*, 5 Ill. 117, the following state of facts existed: "One Ornett conveyed to one Rixford certain premises by deed, dated May 12, 1827, and recorded October 31, 1836. By a deed of release dated March 21, 1835, and recorded the same day, the said Arnett remised, released and quit-claimed to one McConnell the same premises. And by a deed of bargain and sale of said premises to said McConnell, dated the 1st and recorded the 3d of July, 1837, said Arnett confirmed said deed of release, and declared that he thereby intended to convey all the interest which he had in said premises at the date of said deed of release. All these deeds were put in evidence. Thereupon the court, while declaring that the prior record of a deed of release will give it a preference over a deed previously executed and subsequently recorded, held that in this case the force of the deed of release was to be limited by the deed of bargain and sale confirming the same, and that as the latter limited the deed of release to the land actually owned by the grantor at the date of the release, the title to lands previously conveyed, though by a deed subsequently recorded, did not pass. It is not clear wherein the force of the deed of release was affected by the confirmatory deed of bargain and sale, inasmuch as the deed of release, like the confirmatory deed, purported to convey only such right, title and interest as the releasor had at the date of his release. The distinctions of the court seem very finely drawn, and in the following case the same court seems to have changed its opinion as to the force of a deed of release over a prior unrecorded deed. In *Hamilton v. Doolittle*, 37 Ill. 478, one Menard had executed to one Bailey a quit-claim deed conveying "all lots, blocks, land and fractional blocks, or any interest therein, in the town of Pekin, that I have; also all my right and interest in anywise appertaining" thereto. The court held as follows: "If the words used in the quit-claim deed indicate an intention on the part of the grantor to pass only such land as he owns at the time of its execution, then lands embraced in a prior valid deed will be held to be reserved from its operation, and will not pass thereby, although the prior deed remains unrecorded."

It seems to be the doctrine of the United States courts that a purchaser by a simple deed of quit-claim is not to be regarded as a "*bona fide* purchaser without notice." *Villa v. Rodriguez*, 12 Wall. 823; *U. S. v. Sliney*, 21 Fed. Rep. 894; *May v. Le Claire*, 11 Wall. 232. In the last-mentioned case Mr. Justice SWAYNE, in delivering the opinion of the court, said: "In such cases (*i. e.*, purchases by deeds of quit-claim) the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

These decisions would seem to go far toward placing a purchaser under a naked deed of quit-claim for a nominal consideration beyond the protection of the recording acts, which in the State of New York at least is limited to *bona fide* purchasers without notice, and for a valuable consideration. See *Tiffany v. Warren*, 37 Barb. 571.

While it cannot be maintained but that the nominal consideration of \$1 is sufficient to support a grant in fee, still it is suggested that the absence of all words in the ordinary deed of quit-claim or release indicating an intent to grant the land described, taken together with the inadequacy of the nominal

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consideration of \$1, where that only is expressed, to support a grant of the land, negatives any claim of the releasee to be considered as a purchaser in good faith, and for valuable consideration.

The cases in New York relied upon as establishing the rule that a quit-claim deed is as good for all purposes as a deed of bargain and sale, are *Beddoe v. Wadsworth*, 21 Wend. 120; *Jackson v. Fish*, 8 Johns. 456. The former decided that covenants of warranty might be assigned as well by a release and quit-claim as by a deed of bargain and sale. But here it is to be noted that the releasee was in possession.

In the latter case it was held that the words remise, release and quit-claim in a deed are sufficient to raise a use which the statute of uses will transfer into possession.

Neither of these cases was ever passed upon by the Court of Appeals, and both were decided under the statute of uses, which was substantially abolished by the Revised Statutes of 1880.

In *Bennett v. Irwin*, 8 Johns. 862, it was the language of the court that "a mere release or quit-claim, unless the releasee is in possession, is void."

In short it may be said that the courts of New York, in construing the force of a quit-claim deed, have never clearly gone a line further than the Court of Appeals in *Lynch v. Livingston*, 6 N. Y. 422, where the decision was that "the words 'remise, release and quit-claim' in a deed to one not in possession, where an intent to convey the estate of the grantors is recited, and a pecuniary consideration appears, are effectual as words of bargain and sale."

It will be seen from this review of the authorities that the force and effect of a deed of quit-claim is a matter yet requiring adjudication by the courts. Its force is certainly dependent, not only upon its distinguishing words, but upon the intention of the parties as expressed in the deed. It may, in the absence of possession by the grantee or lessee, be void, as stated in *Branham v. Mayor* and *Bennett v. Irwin*, *supra*; or if an intent to convey be recited, as in *Lynch v. Livingstone*, *supra*, it may have the force and effect of a deed of bargain and sale. The intent seems to be the controlling element. And this may be expressed in various ways — by a formal recital, by the existence of some prior estate in the releasee, by words of grant other than "remise, release and quit-claim." Indeed an adequate consideration or a covenant of warranty seems in some of the cases to imply an intent to convey the estate, as in the Massachusetts cases above referred to.

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CITY OF FORT WORTH v. CRAWFORD.

(64 Tex. 202.)

Municipal corporation — liability for nuisance.

A city, for the purpose of improving its sanitary condition, collected and deposited in one place all the carcasses, garbage, excrement, etc., and buried them there. *Held*, that the city was not liable to an individual for sickness produced thereby.

ACTION for nuisance. The opinion states the point. The plaintiff had judgment below.

Jas. W. Swayne, for plaintiff in error.

M. D. Priest and Carter & Wynne, for defendant in error.

WATTS, J., Com. App. In reference to the liability of municipal corporations for creating or failing to remove a nuisance, this distinction is to be observed: If the nuisance grows out of acts done exclusively in the interest of the public, such as the improvement of the sanitary condition of the city, then it would only be liable for a careless or negligent execution of the duty. But if the acts out of which the nuisance originated or is continued were done for the private advantage or emolument of the municipal corporation, then irrespective of the question of negligence, it would be liable for the injuries resulting therefrom. *Bailey v. New York*, 3 Hill, 531; *Oliver v. Worcester*, 102 Mass. 489; s. c., 3 Am. Rep. 485; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Eastman v. Meredith*, 36 N. H. 296; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687.

From the record it appears that the city authorities established this as a place for the deposit and burial of the bodies of dead animals, garbage, excrement, etc., for the purpose of improving and maintaining the sanitary condition of the city. This was done for and in the interest of the public, and not for the private advantage or emolument of the municipal corporation.

And it also appears that in establishing this deposit or burial ground, the city council, by appropriate ordinances, provided that all deposits should be buried in ditches from four to six feet deep, and made it a misdemeanor punishable by fine for any person to violate these ordinances. And some diligence upon the part of the

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city authorities in the enforcement of these ordinances is shown by the evidence.

There is evidence in the record also to the effect, that if these ordinances had been complied with by parties making deposits upon the designated ground, no injury would have resulted to appellee from the maintenance of that as a place of burial and deposit.

Upon the case as made the court instructed the jury, that if the plaintiff in error created and maintained the nuisance, then to find for the defendant in error. This charge does not announce the law applicable to the case made by the evidence. The liability of plaintiff in error depended upon its negligence in the matter, and the court erred in failing to submit that as the test of liability. The other questions are not so presented as to require consideration.

Our conclusion is that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

WESTERN UNION TELEGRAPH COMPANY V. FOSTER.

(64 Tex. 230.)

Telegraph company — mistake of clerk in correcting mistake of sender.

A telegraph company is not liable for a mistake of its clerk in endeavoring, at the request of the sender, to correct a mistake in the written message.

ACTION for negligence. The opinion states the case. The plaintiff had judgment below.

Jno. A. & N. O. Green, for appellant.

DELANY, J., Com. App. This suit was brought on a claim which is stated as follows:

“ Damages caused by error in transmitting dispatch sent by J. M. Foster to Borden & Borden from San Antonio, Texas, to Galveston, Texas, said error being: ‘ Can put stock on cars * * * at twenty and half dollars,’ instead of twenty-two and half dollars whereby twenty-five head of horses were shipped, with result of loss to said Foster of \$2 per head — \$50.”

The proof shows that on June 3, 1883, the plaintiff below carried

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to the defendant's office a message written by himself which was in these words: "Can put stock on cars fourteen hands up twenty and half dollars two cars good sheep waiting."

The receiving clerk read the message over aloud, and the plaintiff discovered that there was a mistake in it. The words twenty and half should have been twenty-two and half. The clerk undertook to correct the mistake by interlining the proper words. But he also made a mistake, and put the interlining in the wrong place. And so the dispatch when corrected read thus: "Can put stock on cars fourteen hands up twenty and half dollars two cars good two sheep waiting."

It appears, however, that the message was received at Galveston exactly as the plaintiff had written it, the correction which the clerk had made having been from some cause omitted. The plaintiff did not read over the message or hear it read after it had been corrected by the clerk. The clerk in his testimony says that he made the correction at the request of the plaintiff. The plaintiff says that the clerk proposed to make the correction and was permitted to do so by him.

It further appears from the evidence that it is not only not the duty of the receiving clerk to alter messages which are brought into the office, but that he is not permitted to do so. His duties are to receive the message, count the words, receive the money, and convey the message to the operator.

The question to be determined upon this state of facts is whether the telegraph company is responsible for the failure of the receiving clerk to correct appellee's message. We put the question thus because the message was sent just as it was written by appellee; and if he has any cause of complaint, it must be that the clerk proposed to correct the message and failed to do so.

Wood in his work on Master and Servant lays it down as an inflexible rule, that "for all acts done by the servant under the express orders or directions of the master, as well as for all acts done in the execution of the master's business, within the scope of his employment, the master is responsible; but when the act is not within the scope of his employment, or in obedience to the master's orders, it is the act of the servant and not of the master, and the servant alone is responsible." Page 536, section 279.

Again on page 555 the same author says: "In order to charge the master, the injury must arise from an act done in the service

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of the master, and from the doing of an act which the master was bound to perform, or which he had directed the servant to do. If the service is rendered for another, or in doing that which some other person is bound to perform, he is acting as the servant of him on whom the duty rested."

It follows from what has just been said that when the master owes a duty to a third person, and that duty is performed by a servant so carelessly that damage results, the master is liable. Did the company in this case owe to appellee the duty of writing his messages, or of correcting them when he had written them amiss? It would seem not. Had the company in any way ordered its servant (a clerk) to do this for the plaintiff? There is no proof that it had. Then the servant was acting beyond the scope of his duty, and it makes no difference whether, in making the correction, he acted *sua sponte* or at the request of appellee. We refer also to the case of *Telegraph Co. v. Edsall*, 5 Law Rev. 221.

This seems to us to determine the whole case. The judgment should be reversed, and as the trial below was without a jury, we recommend that judgment be rendered for the defendant.

Reversed and rendered.

 HAMILTON V. TEXAS AND PACIFIC RAILWAY COMPANY.

(64 Tex. 351.)

Railroad — duty to keep stations safe

A railroad company is bound to make and keep its station platforms and the approaches safe for persons going there to receive or part with passengers.*

ACTION for personal injuries by negligence. The opinion states the point. The defendant had judgment below.

Carter & Wynne, for appellant.

WALKER, J., Com. App. The court erred we think, in sustaining defendant's special exception to the plaintiff's petition. The principle seems to be well settled that a railroad company "is under a

* To same effect, *McKone v. Mich. Cent. R. Co.* (57 Mich. 601), 47 Am. Rep. 596.

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special duty to persons who come upon its premises for the purpose of doing business with it as a common carrier. In this case it gives an invitation as well as a license, and does so under the expectation of profit therefrom. It must provide and maintain for them safe approaches to the stations and safe platforms." *Pierce Railroads*, 275.

The important question in this case is, whether the plaintiff shows, under the facts alleged in his petition, that he and his wife are persons who are to be regarded as being embraced within the above rule. The limitations of the rule as to those who are, and those who are not, comprehended within it, are fully stated in several well-considered cases of high authority, and without attempting a discussion of the subject, we will content ourselves with following what seems to be the rule established by those decisions, to the effect that the plaintiff is clearly within the protection of the rule. Among those to whom the company is under this obligation are "persons who are on the premises to welcome the coming or speed the parting guests." See *Pierce Railroads*, *supra*. The plaintiff and his wife occupied that relation, and more; they went to the defendant's depot as assistants as well as friends, in order to aid two old and decrepit persons whose business there was to take the defendant's train. If the infirmities of passengers to go on the train required the assistance of friends to see them safely on board, servants or friends attending them for that purpose would clearly be in attendance at the depot under an invitation of the company as direct as that given to the passengers themselves. or to hackmen who carry them to and from the station.

In the case of *Tobin v. Portland, S. & P. R. Co.*, 59 Me. 183; s. c., 7 Am. Rep. 415; where a hackman who was accustomed to carry passengers to and from a railroad depot was injured by a defect in the platform, he was held entitled to recover on the ground that he was there by the license and permission of the railroad company, and by the accommodation afforded by him to travellers actually contributed to help the company's business. 8 Eng. & Am. R. Cas. 551. And it seems to have been taken for granted, in the case of *Langan v. Iron M. & S. R. Co.*, 72 Mo. 392, 3 Am. & Eng. R. Cas. 357; that where a person was at a station helping off a friend with his trunk, the company was bound to exercise as to him due care. As to parties speeding and welcoming friends at railroad stations, the following cases are compiled in 18 Am. & Eng.

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R. Cas. 156, showing the liability of the company for injuries occasioned to such parties whilst at the station, viz.: *Lucas v. New Bedford, etc., R. Co.*, 6 Gray, 64; s. c., 66 Am. Dec. 406, *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27; *Langan v. St. Louis R. Co.*, 3 Am. & Eng. R. Cas. 355; *McKone v. Mich. Cent. R. Co.*, 13 Am. & Eng. R. Cas. 29; 57 Mich. 601; s. c., 47 Am. Rep. 596.

We conclude therefore that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

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(64 Tex. 374.)

Taxation — equality and uniformity.

A law imposing a tax on owners of sleeping cars for running them over the railway of another, but exempting the act of running the same kind of cars over the road of the owners of the cars, is unconstitutional.

ACTION for a tax. The opinion states the case. The plaintiff had judgment below.

Mason & Caw, for appellant.

J. H. McCleary and *John D. Templeton*, for State.

STAYTON, A. J. The general nature and result of this action is thus stated by counsel:

“This suit is brought by the State of Texas, by its attorney-general, charging that appellant is pursuing the occupation of owning and running on railroads in Texas palace sleeping and dining-room cars; that on and after the 24th day of March, 1881, appellant, for the privilege of pursuing said occupation, became liable and indebted to appellee in the sum of \$2 for each mile of railroad in the State of Texas over which appellant’s said cars run, as an annual occupation tax—said cars not being owned by any of the railroad companies who own the railroads, claiming in the aggregate \$5,000.

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“Defendant pleaded general and special demurrer, general denial, unconstitutionality of the law authorizing the collection of the tax sued for, and repeal of the law before the collection of the tax, and that defendant’s cars were interstate and not liable to occupation tax.

“The cause was submitted to the District judge without jury. The trial resulted in a judgment for plaintiff in the sum of \$4,302.”

There are many assignments of error, some of which do not properly arise upon the record before us, and many of the others refer to matters not deemed important or necessary to be considered.

The first essential inquiry which arises is: Is the act under which the tax is claimed invalid, in so far as it affects the question involved in this case?

The tax in question is claimed under that part of the act of March 24, 1881, which is as follows: “From every person, firm or association of persons owning or running any palace, sleeping or dining-room cars not owned by the railway company, on any railroad in this State, there shall be collected an annual tax of \$2 per mile for each and every mile of any and all railroads in this State over which such cars may run. The tax herein due shall be paid by said person, firm or association of persons, to the comptroller of public accounts, whose receipt, under seal, shall be issued to the company, person or firm, certified copies of which shall be evidence of the payment of the State tax; provided, that nothing herein contained shall authorize the levy of any county or municipal tax upon such person, firm or association of persons.” Gen. Laws, 1881, p. 58.

The tax contemplated by this part of the act is not a tax upon property, which under the Constitution must be taxed in proportion to its value; nor is the tax upon persons, which must be uniform.

It is a tax imposed on a named business which may be carried on by natural persons or by corporations within this State on property belonging to others; and such as is designated in the Constitution an “occupation tax.”

The act applies to three classes of natural persons or corporations, distinguished by their different degrees of ownership or relationship to the entire property with which the business is conducted.

1st. It applies to the owners of such cars as are named, who run them or permit them to be run on railways within this State not belonging to the owners of such cars.

2d. It applies to such persons or corporations as do not have

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the full ownership of such cars, who with right or without right to use them as against the owners, do run them on railways within this State, such persons not being the owners of the railway on which they are run.

Upon these two classes the tax is imposed.

3d. It applies to persons or corporations who own or run such cars on railways belonging to themselves, and upon such imposes no tax whatever on the business.

The pursuit of the business, with the cars described, constitutes the occupation taxed, and the ownership is not made an element by which the amount of the tax is determined; for the tax imposed on the owner of such cars who runs them is no more nor less than the tax imposed on one who runs such cars not being their owner.

The first and second classes referred to are evidently embraced for the purpose of including all who pursue business with such cars, except the third class, which is not subjected to the burden imposed on the others.

The tax authorized by the act is essentially an occupation tax, in which the ownership of the cars is of no importance, except as it may fix the person on whom the liability is imposed.

The Constitution declares that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." Const., art. 8, § 5.

Under the act a railway company is not made liable for the tax if it uses on its own road its own or the cars of others, in every respect the same as those named in the act, and used in the same way and business, with like charges for the use of such cars, in addition to the ordinary and lawful charges for carriage, as are made by persons or corporations owning or running such cars on railways not their own.

The inquiry arises whether a law which thus imposes a tax on others than railway companies, for the pursuit of this business, while it exempts railway companies therefrom does not violate the provisions of the Constitution referred to.

That the tax contemplated by the act is an occupation tax is too clear for discussion.

Does the business done by persons or corporations owning such cars and running them on the roads of others, or the business done by persons not owning but running such cars on the roads of others, and business done by railway companies on their own roads with such cars, embrace the same class of subjects of taxation?

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The subject of taxation is the thing or business done ; the occupation followed for and on account of which the tax is imposed on persons and corporations that pursue it.

The business or occupation of the owners of such cars running them on the roads of others, and of those who are not owners but run such cars on the roads of others, in so far as the particular occupation for which the tax is imposed is concerned, in no essential differs from that pursued by a railway company that runs its own cars of the same kind for the same purpose over its own road. The same acts and facts make the occupation in either case and it looks to the same end and purpose.

The business or occupation of the one is conducted by the same means as the other, leads to the same results to the persons conducting it and to the persons accommodated by it.

The business or occupation taxed under the act in question is certainly nothing more than the running of cars of a certain kind on railways for the purposes for which such cars are ordinarily used. This is the business or occupation of a railway company in so far as it runs its own cars of the same kind on its own road for the same purposes, making a charge for the use of such cars other than is made for the ordinary transportation of passengers on account of the increased comfort and convenience of passengers afforded by the use of such cars. A business or occupation separate and apart from its ordinary business of transporting passengers ; and on this ground only can be defended the demand or receipt of any sum whatever in excess of the rate fixed by law for the transportation of passengers.

That a railway company may pursue another business or occupation than that taxed by the law in question cannot affect the question whether a business which it does pursue is the subject of taxation for the pursuit of which others are taxed ; nor can the fact that it owns other property without which the occupation in a given case could not be pursued affect the question.

Do railway companies who run cars of the kinds named in the statute, on their own roads, pursue the same class of occupation as those who own or run cars of the same kind on the railways of others ?

There are many classes of occupations subjected to taxation by the laws of this State. Many of these classes however are distinguished by the fact that the occupations themselves are entirely

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different and distinct in character, and in reference to such no question of classification can arise. There are however some occupations taxed which are very kindred in the elements which make them up, i. e., the acts and things which constitute the occupation taxed. The person who sells liquors of given kinds in quantities less than a quart is held to follow an occupation separate and distinct from that followed by a person who sells the same kind of liquors in quantities of a quart and more and upon each of those occupations a tax is imposed but they differ in amount. Here the facts which constitute the occupation are in part the same but not entirely so; and hence are held to belong to different classes of occupations and not required to pay the same amount of tax.

Merchants are taxed on their occupations, but are classed in accordance with the amount of business presumed to be done by them, evidenced by the extent of their annual purchases; but while the occupation of any of these classes involves the acts of buying and selling, the extent of the former act determines the class to which the merchant belongs.

Bankers, money brokers, operators of photograph or other like galleries, auctioneers, cotton brokers and factors, stock and bill brokers, and some others, are compelled to pay an occupation tax, and for this purpose are classed in accordance with the population of the place in which they do business. In all those cases, place, connected with and determined by population, in which the business is carried on, is an element in the determination of the class of occupation to which each one belongs.

In all these classes of cases an intention is manifested to make taxation as near equal and uniform as in the nature of things it can be done, and with a view to this end the classification made to depend upon the existence of some act or fact necessary to the one class but not to the other; the taxes being uniformly higher or lower as the facts on which the classification is made to depend render it probable that the tax payer from the given business derives greater or less profit.

There is no act or fact entering into the occupation of running such cars as are mentioned in the statute, over the road of another, which does not enter into the occupation of the road owner who runs over his own road the same kind of cars for the same uses and purposes, from which the road owner can be withdrawn from the class on which the statute imposes the tax.

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If the things done constitute in one person or corporation the taxed occupation, no one doing the same things can be omitted from the class taxed, without a violation of the constitutional provision; even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may, within itself, constitute a distinct occupation subject to taxation, however kindred in nature the occupations may be.

The legislature may classify subjects of taxation, and these classifications may, as they will, be more or less arbitrary; but when the classification is made all must be subjected to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some other constitutional provision.

The fact that a railway company owns the railway over which it runs its own, or the cars of some other person, cannot affect the question of classification; for such ownership is not one of the elements on which others are placed within the class.

A classification which would impose such a tax on the merchant, banker, auctioneer, dentist, lawyer or other person who does not own the house in which he pursues his occupation, while it does not subject to such taxation persons following the same occupations in houses owned by them, would at once be declared an infraction of the Constitution which declares that "all occupation taxes shall be equal and uniform upon the same class of subjects."

The fact that persons and corporations not made subject to the tax pay an *ad valorem* tax on the property which they use in connection with the occupation which they pursue cannot affect the question; for such tax is required of all property owners, and from it they cannot escape because they pay an occupation tax on the business in which such property is used. *Davis v. Mayor*, 64 Ga. 133; s. c., 37 Am. Rep. 60; *Johnston v. Mayor*, 62 Ga. 650; *Kelly v. Dwyer*, 7 Lea, 180.

The owners of cars made subject to the occupation tax are also subject to an *ad valorem* tax if they be residents of the State, or the property so situated as to make it subject to taxation within the State.

Nor can the constitutional requirement, in reference to occupation taxes, be evaded, or its application rendered unnecessary, by the fact that the person or corporation pursuing the occupation

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pays an income tax; nor by the fact that an occupation tax is paid upon a business kindred to that on account of which the given occupation tax is claimed. *Kelly v. Dwyer*, 7 Lea, 180; *Burch v. Mayor*, 42 Ga. 596; *Hirsh v. Commonwealth*, 21 Gratt. 785; *Woolman v. State*, 2 Swan. 353; *State v. Stephens*, 4 Tex. 139.

It is suggested, if the statute is violative of the constitutional provision referred to, that it should not be held void in so far as it imposes the tax, but that those who by its terms are exempted from its operation should be held subject to its provisions.

The legislature alone can impose taxes, and determine what occupations shall be taxed; and when it imposes an occupation tax and expressly declares that given persons or corporations shall not be subjected to it, the courts have no power to declare that they shall; but they have the power to declare that the act by which such a discrimination is made is inoperative upon those upon whom the burden is attempted to be imposed, because violative of the rule requiring equality and uniformity. The legislature has changed the statute so as to make the tax upon the particular occupation operate upon all engaged in it, thus recognizing the invalidity of the act under which the tax in this case is attempted to be collected. It is unnecessary to consider the other questions presented.

The judgment of the court below will be reversed and the cause dismissed.

Reversed and dismissed.

AARON V. BROILES.

(64 Tex. 316.)

Negligence — municipal officers removing infected persons.

While the board of health, mayor and marshal of a city may remove from the city persons infected with small-pox, yet they are liable for negligence in doing so, and for removing them in stormy weather and putting them in an unsafe and unprotected tent, whereby they are so exposed that death ensues.

ACTION for damages. The opinion states the case. The defendant had judgment below.

W. G. Horsley and R. J. Boykin, for appellant.

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DELANY, J., Com. App. In our opinion there is no merit in the first and second assignments of error. The right of the city council of Fort Worth, acting under legislative authority, to enact and to enforce the ordinance which was introduced in evidence, is not to be questioned. R. S., art. 468; Cooley Const. Lim. (4th ed.) 729, art. 2; Dill. Mun. Corp., § 95.

If the continuance of Mrs. Aaron and her child in the city was incompatible with the safety of the people of the city, we have no doubt that the city authorities might remove them. But we have as little doubt that the city, and those to whom she intrusted this important duty, were bound to make every reasonable provision for the safety of those unfortunate persons.

We think therefore that there is error in the charge of the court. In the first place, the jury were told that in order to a recovery the removal must have been not only wrongful, but without authority of law. Now in our opinion, it might have been entirely lawful and right to remove the mother and child, and yet the thing may have been done in such a way as to inflict upon them the greatest possible injury.

In the next place, the jury are told that if those who removed the mother and child were acting under the authority of law, then in order to find against them, they must have acted maliciously, willfully and oppressively, or with gross negligence. This we think was error.

The bailee of the most common property is, under some circumstances, required to use the highest degree of care. If the defendants had taken possession of the plaintiff's mule or horse, to be used for the benefit of the city, the law would have exacted of them the highest degree of care. 1 Wait Act. and Def. 497. Can it be that when, for the benefit of a city, its officers take possession of a man's wife and child, the law will say to the custodians, "You must not bear malice toward the sufferers, but all that is required of you is that you shall not be guilty of gross negligence?" We think not. It is true the court charges that if there was malice or gross negligence, the jury might award exemplary damages; but the drift of the charge seems to be that unless there was malice, oppression or gross negligence, there could be no finding at all against the defendants.

The statute provides that "an action for actual damages on account of injuries causing the death of any person may be brought

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in the following cases: * * * 2d. When the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another." R. S., art. 2899. Art. 2901 provides that "when the death is caused by the willful act, or omission, or gross negligence, of the defendant, exemplary as well as actual damages may be recovered."

If the defendants caused the removal of the plaintiff's wife and child without the care and precaution which the circumstances required, and if the deaths resulted therefrom, then in our opinion, they are responsible; and the fact that they were city officers, and acting under a city ordinance, does not shield them. 2 Thomp. Neg. 823; Story Agency, § 320, and cases cited; *Nowell v. Wright*, 3 Allen, 166. We are also of opinion that the charge given at the request of the defendants was erroneous. The jury were told that the board of health, while acting under the city ordinances in devising plans to protect the city against disease, were acting in a judicial capacity, and were not responsible for errors and mistakes of judgment. There was nothing judicial in the act of moving this woman and child, and the question is not whether the policy was wise or unwise, but whether there was a wrong done in one of the details of its execution.

In another part of the same charge the jury were told that "it was the duty of the city to provide a pest-house, employ physicians, nurses, and make all necessary arrangements for the treatment, protection and comfort of the patients in the pest-house or tents under their control; and that the defendants would not be liable for any injury resulting to plaintiff's wife and child from the want of care of the same after they reached the hospital or tent."

The evidence is somewhat indefinite, but from it we infer that the board of health, or some of its members, provided the tent in which the woman and child were placed.

Nor does it clearly appear whether the tent was the pest-house or not. It is thus described by the attending physician: "An eight-ounce tent of thin ducking, and the rain beat through it and in it on the sides, and the wind blew in under it. It had no fly or guys. It had no stove or fire of any sort in it. * * * Three or four days after the parties were taken to the tent there came up a rain and severe hail storm. The wind beat through and under the tent, and wet the bedclothing, the child and the mother, and everything in the tent. Plaintiff and his wife used every means and effort to

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keep the child dry, but could not do so. The storm was in the night, and it turned much colder just afterward. Immediately afterward the child grew worse and died." The next witness states that a large majority of the small-pox patients sent to the pest-house died, and that all the confluent cases died with perhaps one exception.

One of the defendants, who seems to have had charge of the place, or places, where patients were kept, testifies that "after the rain and hail storm, he ordered a fly to be added to the tent in which Aaron's wife and child were staying; that he also ordered a stove to be put there. The fly was put to the tent, but he never saw any stove there." He considered the tent "a pretty fair tent, and that a good tent was better for small-pox than a bad house." In our opinion the charge was not applicable to the evidence. Without further comment on the case, we recommend that the judgment be reversed and the cause remanded.

Reversed and remanded.

CONE v. LEWIS.

(64 Tex. 381.)

Execution — exemption — "wagon" — dray.

A dray is exempt from execution as a "wagon." (See note, p. 768.)

ACTION for conversion. The opinion shows the case. The plaintiff had judgment below.

W. K. Homan, for appellant.

Antony & Wilcox, for appellee.

STAYTON, A. J. [Omitting other points.] It is urged that the dray levied upon was not exempted from forced sale although it belonged to the head of a family and was the only vehicle of any kind owned by him.

The statute exempts from forced sale, if owned by the head of a family, one wagon, one carriage or buggy. R. S. 2335.

In determining whether a dray is embraced within the meaning

of the word "wagon," it is proper to look to the intention of the legislature in giving the exemption, and no such restricted meaning should be given to it as will defeat that intention.

"The intention of the legislature was to protect all (heads of families) in the pursuit of their occupations, and a correct construction of the law would seem to protect the drayman and cartman in the possession of their vehicles, although they do not come within the strict definition of the word 'wagon.'" *Rogers v. Ferguson*, 32 Tex. 535; *Nichols v. Claiborne*, 39 Tex. 366; *Gordon v. Shields*, 7 Kans. 325; *Quigley v. Gorham*, 5 Cal. 418; s. c., 63 Am. Dec. 139.

The statute does not give the exemption of a vehicle which may be classed as a "wagon" to persons only who may be farmers, or who pursue some given occupation, but "to every family;" and the fact that the plaintiff was pursuing the business of a drayman, or that he used the vehicle in any particular way, could not defeat the exemption.

To a person pursuing the business of a drayman such an exemption would seem peculiarly appropriate, and in harmony with the spirit of the statute which exempts "all implements of husbandry," and "all tools, apparatus and books belonging to any trade or profession."

The judgment is not erroneous, and is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—The terms "cart," "wagon," "carriage," etc., have received a good deal of construction.

In *Smith v. Chase*, 71 Me. 164, it was held that a peddler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the side and a railing around the top, and dasher in front, is not exempt as a "cart or truck wagon." The language of the statute is: "One plow, one cart or truck wagon, one harrow, one yoke with bows, ring and staple, two chains, one ox sled and one mowing machine." The court said: "The plaintiff claims that it comes directly within the definition of a truck wagon, which he says is a wagon used for the transportation and exchange or barter of commodities, deriving truck from the French verb *troquer*, 'to exchange, to barter, to truck.' Defendant derives it from the Greek * * * 'a wheel' from which came the English truck and trucks, signifying 'a low carriage for carrying goods, stone,' etc. Both fortify their positions by Webster's dictionary, as acknowledged authority, but this does not bring us perceptibly nearer a solution of the question: What did the legislature intend to exempt as 'a cart or truck wagon?'" "We do not believe that the legislature intended to exempt under the term 'truck wagon' one of those movable stores that traverse the State on wheels or runners, cov-

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ered it may be with the meretricious adornments of carving and gilding, as well as paint and varnish, but rather one of those vehicles used most commonly for farm work or heavy hauling with horses or mules, as 'a cart' is with oxen."

A police magistrate in London recently held that a "perambulator" or baby carriage is a "carriage," within the statute prohibiting "any cart or carriage, sleigh, truck or barrow upon any footway," i. e., sidewalk. The *London Law Journal* says: "This decision will carry dismay into the nursery. * * * We agree that two perambulators are an obstruction, and that nurse maids combining in the attack will often trample the toes of passers-by under their chariot wheels. But if one perambulator is a carriage in the obstructive sense, so is a toy wheelbarrow or a child's horse."

"Carriage," in a bill of lading, does not include a street car. *Cream City R. Co. v. Chicago, etc., R. Co.*, 63 Wis. 93; s. c., 53 Am. Rep. 267. The court said: "We are clearly of the opinion, that the word 'carriage' as used in said bill of lading, when considered in connection with the other things from which exemption from liability is sought by the carrier, cannot, except by the most enlarged construction, be held to include a street railroad car. The carriers in this same bill of lading call this thing, which is said to be a 'carriage' within the ordinary meaning of that word, a 'street railroad car on wheels.' They do not designate it as a railroad 'carriage' but a 'car.' To the ordinary mind, in this country at least, the word 'carriage' alone does not convey the idea of a railroad car, or of a street railroad car, nor does it even convey the idea of a wheeled vehicle used for the transportation of merchandise or products used in ordinary business. The idea conveyed is a vehicle used for the transportation of persons either for pleasure or business, and drawn by horses or other draught animals over the ordinary streets and highways of the country, and not cars used exclusively upon railroads or street railroads, or street railroads expressly constructed for the use of such cars. As yet in this country the vehicles used for the transportation of passengers on railroads and street railroads are generally called 'cars' and occasionally 'coaches,' seldom if ever 'carriages.' The definition given by the older lexicographers of the word 'carriage' was of the most general and indefinite kind; but that given by those writing in our own times is more in consonance with the restricted and more definite meaning of the words as understood by people in general. Johnson in his dictionary, dating back one hundred and thirty years, defines the word 'carriage' as 'a vehicle;' 'that in which any thing is carried.' In later years, Worcester defines it as 'any vehicle on wheels, especially a vehicle of pleasure or for the conveyance of passengers.' Webster as 'that which carries or conveys on wheels; a vehicle, especially for pleasure or for passengers; sometimes for burdens, as a close-carriage; a gun carriage.' In the Imperial Dictionary, which is the latest authority, 'carriage' is defined as 'that which carries, especially on wheels; a vehicle.' This is a general term for a coach, chariot, chaise, gig, sulky or other vehicle on wheels — as a common carriage on trucks; a block carriage for mortars and truck carriage. Appropriately the word is applied to a coach, and carts or wagons are rarely or never called carriages. If the definition given by Johnson was the true definition of the word in his time, it will be seen by a reference to the definition in the Imperial Dic-

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tionary, that its common and ordinary meaning has been restricted to those vehicles which are used for the carriage of persons, such as a coach, etc., and does not include those wheeled vehicles which are used for the carriage of burdens only, such as wagons or carts; and most clearly does not include railroad cars, which can be used only on roads properly constructed for their use. Neither Webster, Worcester nor the Imperial Dictionary mentions railroad cars as coming within the common and ordinary meaning of the word 'carriage.' It is undoubtedly true that the word 'carriage' might sometimes be construed to include railway cars and other vehicles not coming under the denomination of coach, chaise, chariot, gig or sulky. The meaning to be given a word which may be used to designate a variety of things must in all cases depend upon its associations and the subject-matter in relation to which it is used. The association in which the word is found in the bill of lading in question in this case, to our minds, clearly points to a meaning which excludes the idea of a railroad car or street railroad car. All its associates are things either fragile in their nature or such as are easily damaged by exposure or perishable. Railroad and street cars are not the natural associates of the other articles mentioned in the exemption clause."

"Wagon ordinarily includes a buggy, but not an insurance agent's buggy, under a statute of exemption when connected with cart or dray, plows, drags or other farming utensils." *Gordon v. Shields*, 7 Kans. 325. The court said: "This clause was evidently designed for the protection of the *farmer*." "The articles should be adapted to the purposes of husbandry." One judge however dissented, holding that a lawyer's or a hardware merchant's buggy would be exempted.

So in *Duigman v. Raymond*, 27 Minn. 207, it was held that a "buggy" being "a single-seated, one horse, covered vehicle or pleasure carriage, designed and adapted for carrying persons only," and as such used by the owner, is not exempt from execution as a "wagon, cart or dray." But later in *Allen v. Conates* the same court held that a "buggy" is a "wagon."

A two-wheeled carriage, used for carrying goods and also for persons to ride in is not a cart. *Danby v. Hunter*, 5 Q. B. Div. 20. This was an information against the defendant for using a cart on the highway without having his name painted thereon. The cart in question was a light, spring cart, and was used by the defendant, a maker of agricultural implements, for conveying them to market as well as for driving himself and family from place to place. He paid the annual duty imposed by statute on every "carriage" with less than four wheels.

In *Taylor v. Goodwin*, 4 Q. B. Div. 228, it was held that a velocipede is a "carriage." The appellant was summoned to answer under the statute of William IV, "for furiously driving a carriage called a bicycle on a public road." But in *Williams v. Ellis*, 5 Q. B. Div. 175, it was held that a bicycle is not a "carriage" within a statute imposing a toll "for every carriage drawn or impelled or set in motion by any other agency or power than being drawn by horse or other beast power. The court say: "The act was clearly intended to apply only to carriages of a heavy description, impelled by mechanical power. A bicycle therefore is not more a 'carriage,' within the meaning of the statute than a wheel-barrow or perambulator would be."

In *Isaacs v. Third Ave. R. Co.*, 47 N.Y. 124; s. c., 7 Am. Rep. 418, ALLEN,

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J., obiter, doubted whether a street railway car was a "carriage" within a statute passed before street railways were known, and making the owners of carriages running upon highways for conveyance of passengers liable for the negligence of their drivers.

In a proceeding of a criminal nature, a vehicle described as "a certain wagon drawn by four horses and used in the transportation of property and for transferring goods of grocers and merchants," cannot be considered a "hackney coach, carriage, omnibus or dray." *Snyder v. North Lawrence*, 8 Kans. 82, the court said: "These terms each refer to some particular specific kind of vehicle and none of them like the one described. The most general term of the four is 'carriage'; and yet this is understood to refer to vehicles for the conveyance of persons rather than for the transportation of property. The term 'wagon' is of itself far more of a generic term than either of these four. It might indeed without any great impropriety be held to include them all. But it also includes many other kinds of vehicles. A simpler statement that the vehicle of plaintiff in error was a 'wagon' would not show that it was of one of the four kinds named; and the further description shows plainly that it was not."

A hackney coach is not a "wagon." *Quigley v. Gorham*, 5 Cal. 418; s. c., 63 Am. Dec. 189.

A two-horse wagon for hauling lumber is not a "dray." *Mayor v. Powell*, 64 Ga. 625.

A four-wheeled vehicle "used by its owner sometimes as a hack for the transportation of passengers and sometimes as a wagon for the transportation of wood, cotton and corn," is a "wagon." *Rogers v. Ferguson*, 82 Tex. 588. So is a pleasure carriage. *Nichols v. Clairborne*, 39 Tex. 363.

A four-wheeled vehicle, drawn by oxen and employed in farm work is an "ox cart," but a four-wheeled pleasure carriage drawn by horses would not be a "horse cart." *Travers v. Glass*, 22 Ala. (N. S.) 624.

NATIONAL BANK OF JEFFERSON V. BRUHN.

(64 Tex. 571.)

Banks — national — interest.

Where the Constitution and statutes of a State fix a legal rate of interest when none is specified in the obligation, but allow the parties to agree upon any rate, national banks can contract for any rate of interest.

ACTION on a note. The opinion states the case. The defendant had judgment below.

Todd & Higgins, for appellant.

F. M. Henry, for appellee.

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WILLIE, C. J. [Omitting other points.] The important question in this case arises upon the defense of usury, pleaded in bar of a portion of the plaintiff's demand.

That question is: Could a national bank located in Texas contract to receive two per cent per month interest on a note executed March 26, 1874?

Under our Constitution and statutes then in force, eight per centum per annum was to be taken, recovered and allowed, when the rate of interest was not specified (Pasch. Dig., art. 3940); but parties might contract for any rate of interest upon which they might agree, all usury laws having been abolished by the Constitution of 1869. Art. XII, § 44. There was therefore nothing in the laws of Texas to prohibit national banks from charging two per cent per month interest, and if they were restrained from so doing it must have been by reason of some act of Congress regulating this subject. It is claimed that the thirtieth section of the National Banking Law, taken in connection with the laws of Texas in force at the time, did prohibit such national banks as were located in Texas from contracting for such a rate of interest.

That section, so far as pertinent to the question before us, reads as follows: "Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the State or territory where the bank is located, and no more, except that where by the laws of the State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State or territory, or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run." R. S., U. S., § 5197.

The general rule established by this section is, that national banks may charge as high a rate of interest as is allowed by the laws of the State or territory where the bank is located. Under this rule no doubt can exist but that the appellant bank was authorized to charge two per cent per month interest upon the note in suit, as that rate was then allowed by the laws of this State. Was this right restrained by any of the subsequent provisions of the section? The only exception to this general rule as announced in the act of Con-

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gress, is when by the laws of a State a different rate is limited for banks of issue organized under State laws, in that case the rate so limited is to be allowed to national banks located in such State. This exception has no application to the case in hand, as under our laws, no distinction was made between banks and individuals as to the rate of interest that might be charged upon contracts. The only other clause in the section that regulates the rate is that which provides that where no rate is fixed by the laws of the State or territory or district, the bank may reserve a rate not exceeding seven per centum. This is no exception to the general rule already stated, but provides for a class of cases not included in it. The rule is that banks may charge as much interest as is allowed by the local laws to any person whatever. The provision we are considering is in effect that when no interest is allowed by the local laws to any person, natural or artificial, the national banks may charge and receive seven per cent and no more. The statute of the State making no regulations as to what interest may be charged, Congress takes the subject in hand so far as national banks are concerned, and prescribes what rate they may receive. It is clear that this provision does not apply to the case under decision; for as we have seen, the laws of Texas did not regulate the subject at the time the note was given. It prescribed eight per cent as the rate when none was specified in the contract. It allowed conventional interest at any rate when agreed upon between the parties. It made a case clearly within the general rule laid down in the section cited, according to its spirit and intent, and certainly not against its literal meaning.

We are taught by the decisions of the Supreme Court of the United States that this section is to be liberally construed in favor of national banks; that they are national favorites; and even when the language of the statute would restrict them to a less rate of interest than is allowed to individuals, the intendment of the law must be presumed to have been otherwise.

In the case of *Tiffany v. National Bank of Missouri*, 18 Wall. 409, that court held that the exception limiting national banks to the rate of interest allowed to State banks, applied only when this rate was greater than that allowed to others, and not to cases where it was less. Literally construed, the exception seemed to apply in the one case as well as in the other. But the court said that the intention of the law was to give national banks "a firm footing in

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the different States where they might be located. It was expected that they would come in competition with State banks, and it was intended to give them at least equal advantages in such competition." They further said that the intention "was to allow to national associations the rate allowed by the State to natural persons generally, and a higher rate if State banks of issue were authorized to charge a higher rate." It is very evident that this intent would be thwarted if this law be so construed as to allow State banks to charge and receive two per centum per month for money, and at the same time to restrict national banks to seven or eight per centum per annum. We certainly should not so interpret the law where, as in the case of the present statute, the language did not require such interpretation. To hold that the appellant bank could charge no more than eight per cent on the note in suit, is to decide that it cannot contract for conventional interest, though the banks of the State are allowed to do so. This is directly contrary to the express provisions of the federal law which we have cited, in prescribing a general rule by which national banks are to be governed in contracting for interest. *Newell v. National Bank of Somerset*, 12 Bush, 57; *Wiley v. Starbuck*, 44 Ind. 298. It would also deny to national banks a favorable provision of our interest law, and at the same time extend its benefits to State banking institutions.

To hold that no more than seven per cent could be charged upon the note is to say, that at the time it was executed, we had no law in Texas regulating the subject of interest, and providing for its allowance upon contracts of this character, which was not the case. In short, can it be said that a national bank is permitted to contract for interest at a rate allowed by the law of a State, when it cannot charge two per cent though that rate is authorized by such laws? We think these banks are on a footing with other banks, and that they may contract for the highest rate fixed or allowed by the statutes of the State, and that this is the meaning of the thirtieth section of the National Banking Act. This same question was decided by the Supreme Court of California, in accordance with the conclusions of this opinion. *Hinds v. Marmolejo*, 60 Cal. 229.

We think the District judge erred in charging the jury that the note sued on was tainted with usury, and for this error the judgment must be reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

WILLIAMS V. MCKAY.

(40 N. J. Eq. [13 Stew.] 189.)

Statute of limitations — trustee — manager of savings bank — negligence.

Managers of a savings bank, although not receiving pay, are liable for injury by want of ordinary care.

Managers of a savings bank are trustees for depositors, and the statute of limitations does not run against a claim of injury by neglect on their part.

ACTION of damages for negligence. The opinion states the case.
The defendant had judgment below.

W. B. Williams, for himself.

A. Q. Garretson, Peter Bentley, William A. Lewis, James B. Vredenburg and Collins & Corbin, for respondents.

BEASLEY, C. J. This bill was exhibited by the receiver of the Mechanics and Laborers' Savings Bank against its managers, for the purpose of holding them liable for certain losses sustained by the institution from time to time through a series of years. The right to the relief prayed is based on the alleged negligence of these officers in the management of the corporate affairs.

The bill which is somewhat loosely framed contains, in substance,

a statement which is mainly substantiated by details of official delinquencies in the following particulars, viz.: First, in the investment of moneys in a large number of specified instances on insufficient landed security, and in violation of the charter of the company; second, in the loaning of other moneys on mere personal security; third, in permitting the president of the bank, one John Halliard, to withdraw, without giving adequate security, and to apply to his own use, the funds of the bank; and fourth, in the failure to require the president to give bond for the faithful performance of his official duties.

The question before this court is whether the decree appealed from is to be sustained, which holds that these charges, as stated in the bill, do not lay any ground of equity in the complaint.

Viewed in its general aspect, the equitable rule which is applicable to persons holding official positions, such as were held by these defendants, is not in doubt. The duty belonging to such a situation is a plain one — to care for the moneys intrusted to them in the manner provided in the charter, and to exercise ordinary care and prudence in so doing. It is true that the defendants were unpaid servants, but the duty of bringing to their office ordinary skill and vigilance was none the less on that account, for to this extent there is no distinction known to the law between a volunteer and a salaried agent. These defendants held themselves out to the public as the managers of this bank, and by so doing they severally engaged to carry it on in the same way that men of common prudence and skill conduct a similar business for themselves. This is the measure of the responsibility of officers of this kind.

Nor do I find any thing in the charter now before us that curtails or limits the responsibility thus defined. There appears to be neither provision nor expression in this law that indicates a legislative intention to absolve any of these managers from the duties and responsibilities generally inherent in the office filled by them. The charter required the defendants to meet at least twice a year as a board of managers, and such regulation was almost entirely useless unless on such occasions it was their duty to supervise the conduct of their committees, and to look generally into the affairs of the company. There is no ground for the belief that it was the intention of the legislature that none but such managers as acted on committees should have the charge of the affairs of this bank. The only guaranty given to depositors consisted in the reputation of its managers

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with respect to probity and fiscal ability, and such guaranty was a mere snare if more than two-thirds of such officers were to have no substantial part in the management. Doubtless such officers had the right to rely in many respects on the skill and diligence of their committeemen, and if exercising a reasonable circumspection they were unaware of the misconduct or neglects of such agents, they would not be responsible for the consequences. But so plain was their duty to oversee the business done by such committeemen that it seems to me they are chargeable, *prima facie*, with a knowledge of what was doing or had been done in all important matters by such bodies. That they themselves thought this duty of general supervision was incumbent upon them is perfectly manifest from the entire tenor of the by-law prescribing the conduct of business at the semi-annual meetings, and providing that at such times should be read the reports of the treasurer and committees, and of the minutes of the finance committee. From these considerations I think it must be conceded that these officers had no special dispensation from the exercise of that degree of care and vigilance that the law generally exacts of persons holding similar positions.

Nor can I yield to the plea that is so much pressed in the briefs of counsel, that most of the neglects and misfeasances charged in this bill are of such long standing that they are shielded from inquiry by the statute of limitations. After careful examination, my clear conviction is that the statute in question has no place in this proceeding.

It is a mistake, sure to mislead, to regard this suit as one solely in right of the insolvent corporation. It does not rest upon that narrow footing, for the receiver represents not only the corporate body, but likewise the depositors and creditors; and the question which presents itself therefore is as to the *status* of the managers with reference to the latter two classes of persons; and as to them I entertain no doubt whatever that these officers must respond to them in the character of their trustees. In reaching this conclusion the principle so often stated in the decisions and text-books is in nowise controverted, that a trust to be exempt from the operation of the statute of limitations, must be of a nature to stand the triple test, viz.: First it must be a direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a court of equity; and third, the question must arise between the trustee and the *cestui que trust*. And in each of these respects, the present case harmonizes with

the standard. If it is a trust at all it certainly is a direct one, for it arises immediately upon the placing of the funds under the control of this body of officers. Such a transaction has nothing of the nature or qualities of those indirect trusts that require for their creation, a decree of a Court of Chancery, as for example, where money, under certain circumstances, has been fraudulently secreted, and a decree in equity will oftentimes convert it into a trust. It is admitted on both sides that depositors in one of these banks acquire, *ipso facto*, an equitable right, which by taking a certain course they can put in force against the directors or managers if they have sustained a loss by reason of the misfeasance of such officers; and if such a right exist what is it if not the right of a *cestui que trust* against his trustee? This right thus referred to is very plainly not a right inherent in a contract, for a depositor pays his money to the corporation, and makes no bargain with the managers. And yet the law indisputably establishes an equitable right in his favor from the naked fact of his relationship with this class of officers. And it would be singular indeed if the law did not raise up a trust out of such a connection. The affair between the depositor and the managers embraces all the materials out of which trusts are created, for I know of no reason why the transactions denominated trusts have been invested by law with their peculiar qualities and characteristics, except that the property that they embrace is put, by way of confidence, under the absolute control of the person called the trustee, and that the person in whose favor it is so placed cannot enforce or protect his interest in a court of law. And this in all respects is the situation when a man places his money in one of these banks; the transfer of such money is nominally to the corporation, but with the intent to put it under the unsupervised control of the managers in whose appointment the depositor takes no part, his sole reliance being in the honesty and general trustworthiness of such officers, and such an affair as it admittedly creates an equitable right on the one side and a correlative obligation on the other, necessarily establishes a direct trust. It will be also observed that the transaction exhibits the second and third requisites of a trust, inasmuch as the right of the depositor to look to the managers for reparation when a loss has been occasioned by their default, is an equitable one, cognizable only in a court of conscience, and the present proceeding is between the trustee and the legal representative of the *cestui que trustent*.

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And upon this subject the Court of Appeals of New York, in the case of *Hun v. Cary*, 82 N. Y. 65; s. c., 37 Am. Rep. 546, decides that the relation between a savings bank and its directors is that of principal and agent, and the relation between its directors and depositors is similar to that of trustee and *cestui que trust*. Nor is it a contrary view upon this subject expressed by the Supreme Court of Pennsylvania in *Spring's Appeal*, 71 Penn. St. 11; s. c., 10 Am. Rep. 684, and which is a decision much relied on by the counsel of some of the defendants. The only pertinent point decided in that case is that the statute of limitations began to run in favor of a director as soon as he vacated his office, but in so deciding the court was careful to say that the case before it was one between the stockholders and directors, and not one between the latter class of officers and creditors or depositors. With respect to the effect of the statute upon the doings of the officers, so long as they continued in office, the court expressly refused to express an opinion upon the question. It is obvious therefore that this case has but small pertinency to the present inquiry.

And looking upon the present controversy as growing out of a trusteeship, it seems to me incompatible with such a conclusion to hold that the statute in question will begin to run upon the vacation of his office by the manager, because such act has not changed the essential nature of the transaction, for the right of the depositor remains, as before, a purely equitable one, which he cannot enforce in a court of common law. And it is the accrual of the right of action at law which calls the statute, by force of its own terms, into play. Lapse of time therefore is not an absolute bar to an equity of this nature, but lapse of time is often a strong, and sometimes a conclusive circumstance in the administration of the law of equity. Sir John ROMILLY, sitting as master of the rolls, in the case of *Williams v. Page*, 24 Beav. 654, 661, in which a bill had been filed in behalf of shareholders against the managers of a railway company, places this subject in what I deem its true light. He says: "The managing committee of a projected railway company are, as well as the directors of the company after its formation, not the mere agents of the stockholders, but their trustees, and liable to account as such. The trust, no doubt, is a peculiar one, but such as it is they have undertaken to discharge the duties of it, and they must be responsible for the due performance of them. In my opinion all principle and all authority point one way on this

subject, and I should consider myself wasting public time by enunciating and enforcing elementary principles, which are familiar to every one cognizant of legal matters, if I were to enlarge upon this subject. Still, the nature of the trust is such that I should consider time, although not a bar by statute, a very material ingredient in such a transaction, and, having regard to the discretion which courts of equity have always exercised upon this subject, and which, in part, forms an important branch of equity itself, I should think a court of equity would refuse relief to stockholders, and decline to decree such general account against persons so situated, who had, three or four years before, rendered their accounts, divided the money in their hands, and this without meeting with any comment or remonstrance on the part of the shareholders." It will be observed from this extract that the distinguished master of the rolls treats as a matter entirely settled the relationship of the directors to the shareholders as constituting the former a trustee, and declares that to the equities arising between them the statute of limitations is not applicable as a bar.

In the light of the principles thus enunciated let us then look at the substantial statements of this bill, with a view to ascertain whether they do not show a delinquency in official duty which, if admitted, will establish the liability of these managers, as claimed by the receiver.

I will first turn my attention to the loans alleged to have been made on personal security.

The bill states specifically the names of a number of persons to whom such loans on mere personal security were made, giving the amounts and dates of the notes so taken. These transactions covered the entire period of the business of the bank until it was closed by the Court of Chancery under the insolvency proceeding. The notes thus designated were uncollectible on account of the pecuniary irresponsibility of the makers of them. There is a further charge that John Halliard, the president, between the years 1872 and 1878, both inclusive, withdrew from the funds of the bank on his own checks or notes, various sums of money amounting to over \$11,000, and that in the year 1872 he withdrew and applied to his own use the further sum of \$20,000, to secure which he subsequently gave a mortgage, which was not solid security. The bill states that this last transaction took place without the knowledge of the managers, at the time it occurred.

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The chancellor in his opinion says, and I think the view is altogether indisputable, "that the provisions and restrictions of the charter must be regarded as clear evidence of the design of the legislature to prohibit the investment of the funds of the bank on personal security merely, and especially without any security at all. The intention is all the more manifest when the nature of the institution is considered — that it was a savings bank, designed to benefit the public by acting as the custodian of the savings of persons of small means, to invest them safely for the advantage of the depositors."

Here then is presented a clear and palpable violation of duty on the part of these managers or some of them. The inquiry therefore arises, do not these statements of the bill show, until explained, a responsibility in all the defendants for the losses thus arising?

The argument upon this point in favor of these defendants, was two-fold: First, that all but an inconsiderable portion of these investments was barred by the statute of limitations; but we have seen that such position is untenable; and in the second place, it was urged that it was only the committeemen who made these loans who were the responsible parties. But this latter position is I think as untenable as the former. These illegal loans ran through a long period of years, and represented large sums of money; and it is perfectly obvious that it was the settled practice in this business to make them in this form, and it is consequently an inference absolutely necessary from the facts as presented, that the managers as a body knew of such practice. If during the long continuance of this practice, these officers never discovered its existence or knew that their president from time to time drew out of the bank on his own checks and notes these large sums of money, it seems to me that *prima facie* such want of knowledge would be of itself and until explained very clear proof of gross negligence on their part. It does not seem to me that it was possible that these officials, if they faithfully discharged the functions of their office, could have failed to become acquainted with these transactions, and I have no idea that it is the business of this court to draw improbable deductions from the statements of this bill, in order to shield these defendants from answering it. And I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then when disaster to the innocent and helpless *cestuis que trustent* ensued, stifle all complaints

of their neglects by saying, "we did not do these things and we know nothing about them." Plainly such was not the opinion of Lord HARDWICKE, when, in the case of *Charitable Corporation v. Sutton*, 2 Atk. 400, he said: "Committeemen are most properly agents to those who employ them in the trust, and who empower them to superintend and direct the affairs of the corporation. If some persons are guilty of gross negligence, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others." As matters are now present before this court, I think these defendants must be charged with knowledge of the systematic doing of these illegal acts.

And in the next place in my opinion the same inference must obtain for present purposes, with respect to that long series of improper and illegal loans alleged to have been secured by mortgages on property of insufficient value. Many of these instances show a gross neglect of duty by the officers of the bank, and constitute very flagrant violations of the requirements of the charter. It may be that these transactions were kept by the committeemen engaged in them from the knowledge of the other managers, but as the facts now appear there can be no such inference in their exoneration. The misconduct in question was manifested in frequent glaring instances, and it is not easy to imagine how they or some of them failed to be discovered by these boards of managers, on the supposition which, in their favor the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the life of this institution, and thus evince a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference with regard to the security of the money held in trust by them. The remarks of Lord HATHERLY, in deciding the case of *Land Credit Company of Ireland v. Lord Fermoy*, L. R., 5 Ch. App. 763, 770, are so pertinent to this subject, and as I think so clearly define the legal rule that in such cases should be applied, that I deem it well to quote them at length: "I am exceedingly reluctant," says the eminent chancellor, "in any way to exonerate directors from performing their duties, and I quite agree that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attend-

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ing to the business of the company. It appears that under the trust deed they had the power of making loans, and the power of appointing a committee to whom they might delegate all the power they thought proper, and that in fact a committee was appointed, called the executive committee, and that the functions of the directors were transferred to this committee, so far as regarded proposals for business and for loans and other matters. The committee from time to time reported to the directors, and the directors had a right to ask proper questions, and to decide thereon according to their discretion; and the directors must be tried as any other trustees accused of neglecting their duties." Resorting to these principles as properly applicable to the situation of affairs as made apparent on the face of this bill, it does not seem reasonable to declare that the defendants in the present case are not sufficiently inculpated to require them to answer, for it is the rational conclusion that unless they were, according to the expression of the English chancellor, "asleep," they must have become aware of these long-continued infractions of duty on the part of their committees. In both these respects, that is, on the subjects of these illegal loans on mere personal security and on scanty real estate, an answer is due from these officers.

[Minor matters omitted.]

The decision below should be reversed, and a decree made in favor of the receiver on all the demurrers.

Decree unanimously reversed.

HOFFMAN V. CHAMBERLAIN.

(40 N. J. Eq. [18 Stew.] 653.)

Damages — measure of, on failure of title to chattel sold.

Where a single bill of chattels is sold and title fails as to a portion, the measure of damages is the difference between the value of the entire quantity and the value of the remainder. (*See note, p. 788.*)

BILL to foreclose a chattel mortgage. The opinion states the case.

Hoffman v. Chamberlain.

P. S. Scovil, for appellant.

C. A. Bergen, for respondent.

REED, J. Sarah Chamberlain, the complainant below, together with one Amelia B. Ellis, sold to one Mary W. Miller (now Hoffman) certain homestead furniture for the sum of \$1,800. A part of the property sold belonged to Mrs. Chamberlain and a part to Mrs. Ellis. It was paid for in the following manner: \$500 in cash were paid to Mrs. Ellis, and to her were given also two notes of \$150 each and one note of \$100. To Mrs. Chamberlain were given nine \$100 notes. All of Mrs. Ellis' notes are paid. Three of the Chamberlain notes are paid, leaving still unpaid six of the notes given to her. At the time these notes were given a chattel mortgage was executed to Mrs. Chamberlain to secure all these notes to the amount of \$1,300. Mrs. Chamberlain filed her bill to foreclose this mortgage. The defense to it is that some of the articles sold did not belong to either Mrs. Ellis or Mrs. Chamberlain. All the articles to which title is alleged to have failed were sold as the property of Mrs. Ellis and all the notes given to her have been paid. Only the remaining six notes given to Mrs. Chamberlain are outstanding, and it is as security for the payment of these that the chattel mortgage is being foreclosed. If this transaction is to be treated as involving two sales, with a distinct consideration for each, then there is no defense to the present suit.

The failure of title to Mrs. Ellis' goods could not affect the consideration paid to Mrs. Chamberlain under a distinct contract. Upon a consideration of all the circumstances surrounding the sale, I think the affair was understood to be a single transaction, in which all these household goods were sold for a single price. The two ladies who sold were relatives and had been intimately connected in business.

They desired to sell all the furniture to one person. The values which they fixed for the separate articles were for the purpose of determining their separate interests in the consideration.

The notes were made in part to one and in part to the other vendor for the purpose of convenience.

The chattel mortgage was given to secure all the notes without regard to whom they were payable. So far as the purchaser felt concerned in the affair all she wished was to get all the furniture

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it stood in the house. She was not concerned in the proportion of interest in the entire stock so long as she got the title to it at all.

The price was agreed upon, not in view of any part but of the whole lot. The consideration was single, in which both vendors were jointly concerned, and both vendors were equally responsible for any defect in the title to the goods sold for which this consideration passed.

In what articles was there a failure of title ?

It is claimed that title failed to a portion of the goods which Mrs. Ellis had bought of a Mr. Hutchins, and which Mr. Hutchins recovered of Mrs. Chamberlain by an action of replevin. It appears however that the replevin suit against Mrs. Chamberlain was undefended, no notice having been given to Mrs. Ellis or Mrs. Hoffman of the pendency of the action. Nor does the evidence in this case show that Mrs. Ellis had no title to those articles. I think that she had, and that the transaction by which she got possession of the articles was a sale and not a bailment, and although she had not paid for them she could and did pass a title to Mrs. Chamberlain upon which she could have successfully stood in a defense to a replevin suit. The remaining articles in which there was an alleged failure of title were the three Baltimore heaters. As to these it appears that they belonged to the landlord of Mrs. Ellis. Although she put one in the rented premises, the arrangement by which this was done contemplated that it should remain there after the termination of the lease. The other two were placed in the house by the landlord. In respect to these heaters neither of the vendors to Mrs. Chamberlain had title and there should be a deduction from the amount due upon the six outstanding notes for this failure of title.

The question then arises what is the proper measure of the deduction to be allowed ? Perhaps no feature relating to the sale of chattels has been so little, and so unsatisfactorily dismissed and determined in previous adjudications as this. It seems to be the settled doctrine in the English courts that where there is a failure of title to all the chattels sold, the purchaser can treat the transaction as presenting an instance of an entire failure of consideration and may sue for the money paid. *Eichholz v. Bannister*, 17 C. B. (N. S.) 708.

There is however no case decided in their courts that holds that the right of a purchaser is limited to a recovery of this sum in an

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action brought, not for the money paid but for a breach of the warranty of title. The rule is entirely settled that for a breach of covenant for title to real property the measure of damages is the consideration paid and the interest upon such sum. This rule, early settled in the English courts, is the rule in this and many other States.

This rule has also been adopted in many States in this country as equally applicable to breaches of the warranty of title to personal property. The following cases display the extent to which this rule has been adopted: *Uoel v. Wheatley*, 30 Miss. 181; *Ware v. Wealthnull*, 2 McCord, 413; *Wood v. Wood*, 1 Metc. (Ky.) 512; *Crittenden v. Posey*, 1 Head, 311; *Ellis v. Gosney*, 7 J. J. Marsh. 111; *Artur v. Moss*, 1 Oreg. 193; *Goss v. Dysant*, 31 Tex. 186.

A perusal of the opinions in these cases and the reasons given for the adoption of this rule in the sale of chattels is not calculated to vindicate the wisdom of the rule.

This doctrine, so far as it is applicable to breaches of the covenants in real conveyances, rests upon grounds which appertain to the character of real estate. The reason for the adoption of this rule in this class of actions is set forth at length by Kent in the leading case of *Staats v. Ten Eyck*, 3 Cai. Cas. 111; s. c., 2 Am. Dec. 254.

The rule is an exception to the general principle which underlies the measure of damages for breaches of contract, namely, the standard of compensation. This latter rule applies to actions for breaches of warranties of quality in the sale of chattels to its full extent. In what respect the loss resulting from a breach of the warranty of title differs from that resulting from a breach of the warranty of quality in dealing with personal property is difficult to conceive. Outside of the vice of extending an exception to a general rule in any event, there appears to be no reason why the rule of recovery should not be uniform in actions upon both kinds of warranties. Nor do the cases in which the exceptional rule applicable to damages for breaches of real covenants has been extended to warranties of title to chattels, in my judgment, present any reason for such prejudicial action. In nearly all of these cases the question arose in States when and where slavery prevailed, and was in respect to breaches of warranty of title to slaves. The reason stated in many of the cases for the adoption of the rule was the precarious and fluctuating character of that kind of property. In other cases

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the court is content with the citation of the early case of *Armstrong v. Percy*, 5 Wend. 535, as the authority for the rule.

In regard to the latter cases, it may be remarked that the rule is drawn from a remark of the judge who delivered the opinion in that case, in a single sentence, unsupported by authority or reason. And this remark was made in the face of the result in the previous case of *Blasdale v. Babcock*, 1 Johns. 517, in which there was a recovery of the value of the horse and costs upon a warranty of title. The matter actually decided in the case of *Armstrong v. Percy*, was that where an action had been brought against the purchaser by the real owner, who was not the vendor, the purchaser could recover from the vendor the money paid, besides the costs of the suit, which he was obliged to defend. There was no suggestion that the rule controlling in this respect an action for breach of this kind of warranty differed from the rule in actions upon other kinds of warranties. The cases cited, namely, *Curtis v. Hannay*, 3 Esp. 82; *Caswell v. Coare*, 1 Taunt. 566; *Lewis v. Peake*, 7 Taunt. 153, were all actions for breach of warranty of quality, and the measure of damages in these cases was shown to have been dependent upon the pleadings. In the first two of these cases no special damages were set out in the declaration, and there was nothing but the amount of the consideration to show what was lost, so that was ruled to be the measure of damages. In the last case the claim for damages having been broader, it was permitted to the plaintiff to recover, in addition to this, the costs of a suit against him by his vendee, to whom he had sold with a similar warranty.

There is nothing in the matter decided in the case of *Armstrong v. Percy*, which fixes as a rule that for the present kind of warranties the measure of damages is limited to the consideration paid, at interest. The rule, I think, in all actions of this kind is compensation. Where no special damages are set forth, the measure of the loss is the value of the property purchased; and where there is no evidence of value but the consideration paid, that will be taken as the standard of value. Where there is a failure of title to a part, or inferior title only is sold, the loss is the difference between the property as conveyed and its value had the title been as warranted.

In support of the view that this general rule applicable to damages appertains to actions upon breaches of warranties of title to chattels, are the cases of *Grose v. Hennessey*, 13 Allen, 389; *Rowland v. Shelton*, 25 Ala. 217; and the text of Mr. Sedgwick, Meas. of

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Dam. 284. My opinion is that there should be a deduction in this case of the difference between the value of the entire lot of chattels sold and the value of the lot without the heaters. The only evidence of the value of the entire lot is what it was sold for, namely, \$1,800. The evidence in regard to the value of the heaters fixes their value at about \$200.

Adopting these values, there should be a deduction of the latter sum from the notes, and as of the date of the sale, leaving due \$400 with interest.

The decree should be reversed.

Decree unanimously reversed.

NOTE BY THE REPORTER.—In *Armstrong v. Percy*, 5 Wend. 585; MARCY, J., said: "Where the action is on a warranty of title, the damage which naturally results to the purchaser is the value of the article which he loses by the failure of the title, or the price he has paid for it. In the cases of *Curtis v. Hannay*, 3 Esp. 83, and *Caswell v. Coare*, 1 Taunton, 566, no special damages were set forth in the declaration; the measure of damages therefore in those cases was the price paid for the article; but in the case of *Lewis v. Peaks*, 7 Taunton, 152, the declaration assigned as special damage, occasioned by the breach of the warranty, that the plaintiff confiding in defendant's warranty, resold the horse with warranty, and was thereby subjected to pay £88 as costs, besides the price of the horse. Having given notice to the defendant that he was prosecuted on his warranty, and offered him the option to defend (which was not accepted), the plaintiff was allowed to recover, in addition to the price of the horse, the costs which he was subjected to pay. The principle of that case is probably correct; but it may well be doubted whether the plaintiff here has brought himself within it." Of this case Sedgwick says (1 Meas. Dam. marg. p. 294), "the court here appears to have lost sight of the principle laid down in the cases already cited, that the recovery should be estimated, not by the price paid, but by the real value." This however seems to overlook Judge MARCY's alternative, "the value of the article," "or the price paid."

In *Case v. Hall*, 24 Wend. 102; s. c., 35 Am. Dec. 605, and *Burt v. Dewey*, 81 Barb. 540, where the measure sanctioned was the price paid, with interest, the actions were in form for the price paid, and in the latter *Armstrong v. Percy*, was cited, and in no way criticised.

In *Wilkinson v. Fernee*, 24 Penn. St. 190, where fixtures in a shop were sold by the landlord, at a price much beyond their value, the purchaser, on failure of title, was allowed to recover the sum paid. *Armstrong v. Percy* was followed in *Rowland's Exrs. v. Shelton*, 25 Ala. (N. S.) 217, and *Johnson v. Meyer's Exr.*, 34 Mo. 255, slave cases.

In *Ware v. Wetherall*, 2 McCord, 413, a slave case, the question was examined with great care, and the price rule was adopted. The court said: "It sounds well to say, if a man be deprived of \$1,000 worth of property by a defect in his title, that he who sold should be compelled to make it up. But I ask, if

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it is not increasing the calamities of life to make men answerable for that which the most consummate wisdom and incorruptible integrity cannot guard against? Ought it not rather to be regarded as one of those incidents which are common to the lot of men? * * * I would ask if it can be believed that a man, who seventeen years ago received £25 for a negro girl, could have imagined that he now would be called on to respond in damages to the amount of \$10,000? or if that rule can be considered as a rule of justice which shall compel him to do so? And this is not a fictitious case. * * * But I confess that I have thought it a slander on any system of jurisprudence to charge it with such monstrous absurdity."

In *Atkins v. Hosley*, 8 Thomp. Cook, 822, the price paid was held the measure. "It rests upon the principle that a man is entitled to recover back money he has parted with upon a consideration which has failed."

Sutherland (2 Meas. Dam. 418) says: "A loss of the property through a want of title is precisely the same to the vendee as a loss of it because the vendor fails to deliver, and the vendor is equally the cause of the loss in either case by violating his contract. The value of the property at the time the vendee has been dispossessed has been held to be the measure of damages. Generally however the measure has been stated to be the purchase-money and interest; thus adopting the same rule that is applied generally in estimating the damages for breach of covenants of title to real estate."

In *Gross v. Hennessey*, 18 Allen, 389, the measure is held to be the value. "The difference in value between that which the defendants did convey, and that which they covenanted that they conveyed would be the exact measure of the plaintiff's loss by the breach of the covenant. The rules which belong to the covenants of seisin and warranty in conveyance of real property have no application."

In *Dabovich v. Emeris*, 12 Cal. 171, the court said: "The measure of damages was the injury done, which was the loss of the pears. The value of these was the standard of recovery." The same rule was adopted in *Marlett v. Olary*, 20 Ark. 251.

In *Kingsbury v. Smith*, 18 N. H. 109, an action against the true owner from which the plaintiff had obtained the chattel by fraud, it was held that the measure was the value, and that the costs of defense were also a proper item of damages. The court review many authorities, most of them as to real estate, and remark on *Armstrong v. Peck*: "No such question was made in either of those cases" (i. e., those cited in *Armstrong v. Peck*), "and no reason is assigned for the opinion, except that such costs had not before been allowed." They conclude. "The principle deducible from the cases cited would seem to be, that the grantee in an action upon a covenant of warranty, express as in a deed, or implied as upon the sale of personal property, is entitled to recover as part of his damages sustained by reason of the failure of the title conveyed, the reasonable and necessary expenses incurred in a proper course of legal proceedings for the ascertainment and protection of his rights under the purchase, as well as a reasonable compensation for his trouble and expense to which he may have been put in extinguishing a paramount title."

In *Brown v. Pierce*, 97 Mass. 46, an action on an implied warranty of title

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of chattels, it was held that a *bona fide* second purchaser may recover from the seller the value of the chattels reclaimed from him by a prior purchaser, who having procured the sale to himself by fraud, has obtained possession of part thereof, the vendor having done nothing to disaffirm such prior purchaser's title on the ground of fraud.

In *Brown v. Woods*, 8 Cold. 182, the value measure was adopted. The court review *Armstrong v. Peck*, quoting Mr. Sedgwick's criticism of it with approval, and conclude: "As to the measure of damages there seems to be some conflict of authority; but we hold that if the vendor impliedly, and falsely, fraudulently and deceitfully warranted the title to the colt, the vendee upon the recovery of the same or the value thereof by one having the superior title is entitled to recover from the vendor the damages which he has sustained by reason of such false, fraudulent and deceitful warranty; and the damages thus sustained in this case are the value of the colt at the time it was replevied, and all costs necessarily expended by him in the reasonable defense of the title. This seems to us to be in accordance with sound principles of reason and justice."

After examining all the conflicting authorities we are satisfied that the rule deducible from them is that of the principal case, namely, that the true measure is the value unless that is less than the price paid, and then it is the price paid and interest and costs; and where there is no evidence of value, the price paid controls.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

BOHANAN V. STATE.

(18 Neb. 57.)

Criminal law — murder — verdict of higher degree on second trial.

On an indictment for murder in the first degree the defendant was found guilty in the second degree. He appealed and got a new trial, and then pleaded former acquittal of murder in the first degree. The plea was held bad, and on the second trial he was found guilty in the first degree. *Held* valid.

CONVICTION of murder. The opinion states the case.

C. E. Magoon and *O. P. Mason*, for plaintiff in error.

William Leese, attorney-general, and *J. B. Strode*, district attorney, for State.

REESE, J. The plaintiff in error was indicted by the grand jury of the February term, 1882, of the District Court of Lancaster county. There was but one count in the indictment. The crime charged was murder in the first degree. A trial was had at the following May term of court, which resulted in a conviction of murder in the second degree. Plaintiff in error then brought the cause into the Supreme Court, where the judgment of the District

Court was reversed and a new trial ordered. See *Bohanan v. State*, 15 Neb. 209. A change of venue was then taken by which the place of trial was removed from Lancaster to Otoe county. On the second trial the jury found him guilty of murder in the first degree. A motion for a new trial was made and overruled, and the court imposed upon him the penalty of death. He now prosecutes error in this court.

Prior to the commencement of the last trial the plaintiff in error filed in the District Court a plea of former acquittal of the charge of murder in the first degree. This plea contained a recital of the facts of the previous trial on the same indictment, and the conviction thereon of murder in the second degree and his sentence to the penitentiary for life. To this plea the State made answer, alleging that the plea ought not to be sustained for the reason that on defendant's own motion the verdict and judgment were set aside and a new trial granted. Plaintiff in error demurred to this answer. The demurrer was overruled. The plea was held bad and the first trial held not a bar to a prosecution for murder in the first degree, as charged in the indictment.

During the progress of the trial plaintiff in error requested the court to instruct the jury as follows:

“10. If the jury find from the evidence that at the May term, 1882, of the District Court of Lancaster county, in the State of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon such trial was found guilty of murder in the second degree, and judgment was rendered against him upon such finding, then, as a matter of law, the jury in this case cannot find the defendant guilty of murder in the first degree.”

The court refused to give this instruction, but instructed the jury as follows upon that question:

“11. You should not be influenced in the least by any thing that any other jury may have done.”

To the refusal to give the first above quoted instruction, and to the giving of the second, plaintiff in error excepted.

By the foregoing it will be seen that the question here presented is, whether or not the verdict of the jury on the first trial, finding plaintiff in error guilty of murder in the second degree, is such an acquittal of the crime of murder in the first degree as would protect and shield plaintiff in error from the danger of a conviction of the

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higher crime on the second trial, the verdict and judgment having been set aside upon his own motion and request. The question here presented is a new one in this State, and is one of great importance. The question is not new in the sense of its never having been decided in other States; but unfortunately, the decisions of the courts of last resort in other States, upon the question here presented, have not been uniform. The doctrine contended for by plaintiff in error has, to a greater or less extent, been declared by the Supreme Courts of Virginia, California, Tennessee, Illinois, Michigan, Iowa, Mississippi, Wisconsin, Indiana, Alabama, Texas, Missouri and Arkansas. It is not deemed necessary to notice the decisions of all those States, as some of them are simply *dicta* and some are in cases dissimilar to the one at bar, but we will notice the reasoning in what we deem the leading cases upon the subject.

In *People v. Gilmore*, 4 Cal. 376; s. c., 60 Am. Dec. 620, the accused was indicted for murder. Upon trial the jury rendered a verdict of guilty of manslaughter, which was set aside on the prisoner's motion, and a new trial ordered. On the second arraignment he pleaded a former acquittal. Chief Justice MURRAY, in writing the opinion of the court, which at that time (18 4) consisted of himself and Mr. Justice HEYDENFELDT, argues the question at some length and with ability, but to the mind of the writer his deductions are not conclusive. From the opinion I quote as his first proposition as follows: "A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty. The reason is obvious; if such were not the case the party after undergoing punishment for manslaughter might be arraigned and tried again for murder, notwithstanding he had been compelled to answer this charge upon the first trial, and the jury had passed upon the same." This is undoubtedly correct so long as the verdict of the jury is allowed to stand. It must be conceded that until the accused himself procures the cancellation of the verdict the judgment must be a complete protection against another prosecution for the same crime. So also would be a verdict of not guilty. But where the prisoner upon his own motion procures a verdict to be set aside, the rule should be otherwise. In support of his conclusion the learned writer cites *Hart v. State*, 25 Miss. 378, and quotes as follows:

“The jury in such a case, in contemplation of law, renders two verdicts. The one acquitting him of the higher crime, the other convicting him of the inferior.” It is quite difficult for us to adopt this proposition. The verdict in such case must be an entirety. The prisoner stands charged with the unlawful killing of the deceased. He is either guilty or not guilty. If found guilty it is the next duty of the jury to ascertain the magnitude of this guilt. When that is done the verdict of guilty is returned with a finding as to the grade of that guilt. At the time this decision was made the Criminal Code of California contained the following section: “A new trial is a re-examination of the issue in the same court before another jury after verdict has been given. It places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument.”

This section was not deemed sufficient to justify the court in putting the prisoner upon his trial for murder, but the court combats the power of the legislature to enact such a law by the following: “The Constitution of this State has provided that ‘no person shall be subject to be twice put in jeopardy for the same offense.’ Now if I am right that a conviction for manslaughter is an acquittal for murder, it must follow that any law that would compel a party to be re-tried for murder in order to escape the minor offense, thereby putting the party in jeopardy, is in conflict with this provision of the Constitution.” Thus the learned judge in the discussion of the case goes beyond the rulings of any of the other courts. The Supreme Courts of Kansas, Indiana, Kentucky, North Carolina, and others, have not hesitated to follow such laws and apply the principle to capital cases. And in California, in a recent decision, the Supreme Court has, to the mind of the writer, fully overruled the holding in *People v. Gilmore*. In *People v. Keeser*, 65 Cal. 232, it is held that “on a plea of former conviction under an indictment for murder, the fact that defendant was convicted of murder in the second degree will not be a bar to a conviction of murder in the first degree on a re-trial.” It is insisted that this decision was made under a provision of the statute enacted in 1874, which is as follows: “The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the

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former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment." It will be observed that in essence this section does not vary materially from the one in force at the time of the decision in *People v. Gilmore*. It can do little more than to place the parties "in the same position as if no trial had been had," as provided in the first act. But it is worthy of notice that a careful examination of the opinion in *People v. Keefer* fails to disclose any reference to the act of 1874. The decision, by an unanimous court, is based entirely upon another section of the Criminal Code, which was passed in 1856, which divided the crime of murder into two degrees, the first and second. The section, as amended April 19, 1856, is as follows:

"Malice shall be implied when no considerable provocation, or when all the circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly. Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the State prison for a term not less than ten years and which may extend to life."

The court, in the opinion by Judge McKINSTRY, uses the following language: "The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a

particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. *People v. Haun*, 44 Cal. 98; *People v. Doyell*, 48 Cal. 94. After the act of 1856, which divided the crime into murder of the first and second degrees, murder remained and it still remains the unlawful killing of a human being with malice aforethought. Penal Code, 187, 188. The malice may be express or implied; the express intent to kill or to commit one of the named felonies may be affirmatively established, or the killing being proved, the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who on his own motion secures a new trial subjects himself to a re-trial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

It will be observed that the provisions of the amended act of 1856 are very similar to the provisions of sections 3, 4, and 489 of the Criminal Code of Nebraska, except that murder in the second degree is not specifically described. The sections above referred to are as follows:

Section 3. "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death."

Section 4. "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and on conviction thereof shall be imprisoned in the penitentiary not less than ten years, or during life in the discretion of the court."

Section 489. "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter, and if such person be convicted by confession, in open court, the court shall proceed by examination of

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witnesses, in open court, to determine the degree of the crime, and shall pronounce sentence accordingly.”

By section 19 of the act of California, passed in 1850, and which, so far as we are able to ascertain, still remains upon the statute books of that State, murder is defined to be “the unlawful killing of a human being with malice aforethought, either express or implied. * * *

In *Baldwin v. State*, 12 Neb. 61, the then Chief Justice MAXWELL, in delivering the opinion of the court, in referring to the indictment which charged in separate counts the crime of murder in the first degree, says: “There is but one offense charged in the indictment in this case, viz.: The unlawful killing of Allen J. Yokum.” If therefore there is but one offense charged in the indictment in the case at bar—the unlawful killing of James Cook—it would seem that the adjudications of the State of California may well be said to sustain the action of the trial court in placing the plaintiff in error upon his trial for murder in the first degree.

In *People v. Haun*, 44 Cal. 96, the Supreme Court by Judge BELCHER, in speaking of the division of the crime of murder into two degrees, says: “In making the division the legislature recognized the fact that some murders comprehended within the general definition are of a less cruel and aggravated character than others, and therefore deserving of less punishment. It also recognized the fact that some murders of the less aggravated class are deserving of less punishment than others of the same class, and it accordingly provided that murders of the second degree should be punished by terms of imprisonment depending for their length upon the circumstances of each particular case. In all this however the legislature did not intend to say that murder of the second degree should be any thing less or other than murder. It did not indeed attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character as to deserve the extreme penalty of the law, or of a less aggravated character, deserving a less severe punishment.” The same doctrine is held in *People v. Form*, 25 Cal. 361.

In *Brennan v. People*, 15 Ill. 511, and in *Barnett v. People*, 54 Ill. 325. the Supreme Court of that State have held that a defendant cannot upon a second trial be tried for a degree above that for which he was convicted upon the first. In *Barnett v. People* the

court simply follows *Brennan v. People*, without argument or criticism. The decision in the latter case is based upon the cases of *Slaughter v. State*, 6 Humph. 410; *Morris v. State*, 8 S. & M. 762, and *Hurt v. State*, 25 Miss. 378.

In *Slaughter v. State* the plaintiff in error was indicted for murder in the first degree, and upon trial was found "not guilty of murder as charged in the bill of indictment, but they find him guilty of voluntary manslaughter in manner and form as charged in the indictment." On his motion a new trial was granted. At a subsequent term he filed a plea of former acquittal, setting out the proceedings and verdict of the jury. He contended that he was entitled to his discharge and that he could not be tried for any crime under that indictment. The trial court held otherwise and put him upon trial for manslaughter. Error was taken to the Supreme Court, and it was held that the trial court decided correctly. The question as to whether the plaintiff in error could have been convicted of a higher crime than manslaughter was in no sense before the court. Yet it is said that if he had been tried for murder it would have been erroneous. It is quite probable that the finding of "not guilty of murder," by the verdict, would make no difference as to the power of the court to put the accused upon his trial on the whole indictment, yet the court refers to it as a verdict of acquittal.

Morris v. State, 8 S. & M. 762, was a case where the defendant was put upon trial under an indictment containing four counts: 1st. With the forgery of a bank note of the bank of the State of North Carolina. 2d. With uttering and publishing as true a forged bank note of the bank of the State of North Carolina. 3d. With having in his possession certain forged bank notes of the bank of the State of North Carolina, with the intent to utter the same. The 4th was similar to the 3d. The verdict of the jury was guilty as charged in the second, third and fourth counts. The verdict was objected to as imperfect because there was no express finding upon the first count. The cause was taken to the Supreme Court (Mississippi) where the verdict was held good, but the cause was reversed for error occurring in the introduction of testimony. The judgment of reversal provided that the new trial should be confined to the second, third and fourth counts, plaintiff in error having been acquitted upon the first count. It will thus be seen that the question in the case at bar was not before the court for two reasons.

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First, the question did not arise in the case. Second, each count in the indictment was for a separate and distinct offense and not for different grades or degrees of the same offense.

The case of *Hurt v. State*, 25 Miss. 378, was one in which the plaintiff in error had been indicted for murder. He filed certain pleas in abatement, alleging the illegal organization of the grand jury which found the indictment. These pleas were overruled by the court and he was put upon trial which resulted in a verdict of guilty of manslaughter in the third degree. His motion for a new trial being overruled, he alleged error in the Supreme Court, and a new trial was granted upon the ground that the plea in abatement should have been sustained. The judgment of the trial court was reversed, the court holding that its judgment of reversal should extend no further than to relieve him as against the verdict against him (manslaughter). As a new indictment would have to be found, and as a prosecution for the crime of manslaughter was barred by the statute of limitations, the prisoner was upon his motion discharged. The reasoning of the court in this case seems to be based upon the acknowledged and conceded fact that if a party charged with murder and convicted of manslaughter seeks no relief from the judgment of conviction, but allows it to stand unreversed and in full force, he cannot after serving his term of imprisonment be again prosecuted for murder. This is most certainly true. If the judgment stands unimpeached it is the final judgment in the case, and of course will stand as a protection to the party convicted. From this the court concludes that the other proposition must follow, viz.: That if the jury convicts of a lower grade of the same crime that conviction is necessarily an acquittal of the higher grade, and that acquittal must stand for all time, notwithstanding the verdict and judgment of conviction may be set aside. That the jury in contemplation of law renders two verdicts; one acquitting of the higher crime and the other convicting him of the lower, and that the verdict is not an entirety. Upon this theory we think that case as well as *Brennan v. People*, rests. And indeed the same may be said of *State v. Tweedy*, 11 Iowa, 350; *State v. Martin*, 30 Wis. 216; *State v. Belden*, 33 Wis. 120; *Jones v. State*, 13 Tex. 184. These latter cases are exhaustive and well written, and were it not that they all seem to be grounded upon what seems to us to be a false basis, we could well follow them.

The case of *Johnson v. State*, 29 Ark. 31, is a full digest of all the cases so holding, and adopting the same reasoning, holds with them.

It is beyond the comprehension of the writer to say that the character of an act may be finally and forever decided upon and adjudicated, while the fact of the act itself is left untouched. Thus a person is indicted for murder in the first degree under the laws of Nebraska. Upon trial he is found guilty of murder in the second degree. So long as that verdict and the judgment stand unreversed there is an adjudication that the act or crime was committed, and also fixing the character or quality of the act. Now it is very clear and easily understood that this judgment and verdict will protect the accused from another prosecution. But suppose a new trial is granted. There is no adjudication that any person has been killed nor that any crime has been committed. But it is said there is an adjudication that if the deceased was killed by the prisoner, it was not done of deliberate and premeditated malice! It is contended that such a verdict is severable; that there are in contemplation of law two verdicts, one of guilty of murder in the second degree, which has been set aside, and one of not guilty of murder in the first degree, which, by virtue of the constitutional provisions in the Federal and State constitutions, must stand. This theory is also built upon what is considered the difference between an adjudication and having been once in jeopardy. It is true that this distinction does exist to some extent, but yet if the first verdict is worth any thing to a prisoner, it must be upon the theory that he has been acquitted in so far as the criminal quality of the act of killing is concerned, but no further.

In *Hurley v. State*, 6 Ohio, 400, it is decided that the simple verdict of a jury is not a sufficient acquittal to entitle a defendant to its protection, but that to be of any force there must be a judgment on the verdict, citing 2 Hale P. C. 243.

By the statutes of this State a new trial, after a verdict of conviction, may be granted, on the application of the defendant, for certain reasons which are set out in the act. See section 490 of the Criminal Code. A new trial is defined to be a re-examination of an issue of fact. Bouv. Law Dict. It is a re-trial of the facts of the case. In *Zaleski v. Clark*, 45 Conn. 401, Judge LOOMIS, in writing the opinion of the court, says: "It is believed that it always has been used in the sense of a complete re-trial of the

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cause, except in certain instances mentioned by him. What else can a re-trial be than a re-examination of the facts in the same case?"

The principal case in which it has been held, in the absence of a statute to that effect, that a defendant can be retried upon the whole indictment, is *State v. Behimer*, 20 Ohio St. 572. In fact the Supreme Court of Ohio have uniformly so held. In *Hurley v. State, supra*, it is decided that "a verdict in either a civil or criminal case must be considered an entire thing." In *Leslie v. State*, 18 Ohio St. 390, the plaintiff in error was indicted for murder in the first degree. The indictment contained three counts, but each alleging and charging the same offense in the same degree. On the first trial he was found "guilty of murder in the first degree as charged in the first count of the indictment, and not guilty as charged in the second count of the indictment." Upon his motion a new trial was granted, and upon the second trial he was found "guilty of manslaughter, as charged in the third count of the indictment, and not guilty as charged in the first and second counts of said indictment." Leslie then moved the court to discharge him, for the reason that on the first trial he was found guilty of murder in the first degree, as charged in the first count of the indictment and not guilty as charged in the second and third counts, and that upon the second trial he was found not guilty upon the first and second counts of the indictment, and guilty of manslaughter upon the third count, and that the verdict of manslaughter was irregular, illegal and void. The motion was overruled; he was sentenced to the penitentiary, and took error to the Supreme Court. The conviction was affirmed.

In discussing the question of the entirety of the verdict, Judge WHITE, who wrote the opinion, says: "Where the indictment, though consisting of several counts, is founded upon a single transaction the verdict is a unit, and lays the foundation for but a single judgment. A verdict of guilty upon one of the counts and of not guilty upon the other is followed by the same legal consequences as a verdict of guilty upon all the counts; and when in either case the verdict is set aside and a new trial granted on defendant's motion, the case is opened for a retrial upon the counts upon which he was acquitted as well as those upon which he was convicted."

But where the several counts of an indictment are for separate and distinct offenses the rule would of course be different, and it

was so held in the case under consideration. The court says, further: "We think the principle contended for properly applies where there is a conviction and an acquittal on different counts for separate and distinct offenses, or where part of the defendants are acquitted and part convicted of the same offense. But where all the counts are for the same offense, and are varied merely to meet the proof, it has no just application."

The ruling in this case was followed in *Jarvis v. State*, 19 Ohio St. 585. In the case of the *State v. Behimer, supra*, Judge WHITE, in writing the opinion of the court, thus states the question for decision: "The question for decision therefore is, whether the legal effect of granting a new trial was to set aside the whole verdict and leave the case for retrial upon the same issues on which it was first tried, or whether the retrial was properly limited by the court to the degree of homicide of which the defendant had been found guilty, and to the inferior grade of manslaughter." The question is discussed at considerable length with a good deal of logic and reason, and it was finally held that the defendant in the prosecution could be put upon a second trial upon the whole of the indictment the same as though there had been no previous trial and verdict. In the course of the opinion the learned judge makes use of the following language: "But the effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence, and the burden was on the State to prove every essential fact. The only effect therefore that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act, while the fact of the existence of the act was undetermined. This would be a verdict to the effect that if the defendant committed the homicide, he did it without deliberate and premeditated malice."

"There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed, or rather of which under his plea he is in law presumed to be innocent."

Upon the question of entirety of the verdict it is said: "But upon mature consideration we are of the opinion that the verdict is severable only when there is a conviction or an acquittal on differ-

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ent counts for separate and distinct offenses, or where there are several defendants; but that where there is but one defendant, and in fact but one offense, the verdict is entire."

The cause was taken to the Supreme Court upon the exception of the State's attorney and the decision could in no way affect the rights of the defendant in the prosecution, but the rule of law was stated by the court as follows: "Where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial."

It must be conceded that in point of numbers this decision seems to be against the weight of authority. But it is apparently founded upon reason and upon the advanced idea of American jurisprudence. That it is just it seems to us cannot be questioned. That it is necessary for the protection of the law-abiding citizen is equally clear, and the fact that many of the States have incorporated a provision to that effect in their criminal laws gives weight and force to the statement. This decision was made in the year 1870. The criminal law of the State of Ohio was adopted by the legislature of this State in 1873, almost bodily, and by the one act entitled "An act to establish a criminal code," passed March 4th of that year. By it the entire criminal law of that State was substantially transferred to the statute books of Nebraska, in which was the law governing new trials. In *Franklin v. Kelley*, 2 Neb. 104, Chief Justice MASON, in writing the opinion of the court, says: "The rule is well settled that when a legislature re-enacts a statute upon which a construction has been placed, it does so with the construction annexed," citing a number of cases. In addition to which we cite 2 Bishop on Criminal Law, § 905, and note from *Commonwealth v. Hartnett*, 3 Gray, 450. While it may be true that the Ohio decisions cannot, with strictness, be said to be a construction of any statute, yet they are a construction of that part of the criminal code which gives to the courts of the State the power to grant new trials, and therefore of the legal status of the person to whom the new trial has been awarded. To that extent at least it is proper to consult those adjudications as affecting the criminal code at the time of its adoption by this State.

But the Ohio cases are not without precedent. In *United States*

v. *Harding*, Wall. Jr. 127, in the Circuit Court of the United States for the eastern district of Pennsylvania, Harding was found guilty of murder, and Grimes and Williams of manslaughter. Soon after the trial Judge BALDWIN, the Circuit judge, died. A motion for a new trial was made before and argued to Judge RANDALL, the District judge, but before passing on the motion he died. New judges were appointed, and upon their qualification the cause came on for decision. The order of the court was that a new trial be granted to Harding, and that as to Grimes and Williams the case be continued for one week, at the expiration of which they were to elect whether they would take a new trial or abide their former conviction. Judge GRIER then addressed Grimes and Williams as follows: "William Grimes and John Williams — You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offense charged against you in this indictment, the penalty affixed to which is death, but you have been convicted of the minor offense of manslaughter. Your lives have been in jeopardy and you have escaped. The Constitution of your country declares that 'no person shall be twice put in jeopardy of life or limb for the same offense.' This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial except at your election and request. We believe that you have the right to waive the protection thrown around you by the Constitution for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeited to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you. Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course."

In *State v. Commissioners*, 8 Hill (S. C.), 239, the defendants were indicted, in two counts, for obstructing a public street. The

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trial resulted in a verdict of guilty as charged in one count of the indictment, nothing being said as to the other. A new trial was granted upon the motion of the defendant. It was held that the next trial must be upon both counts of the indictment. In the opinion BUTLER, J., says: "If the verdict of guilty had remained, it would have protected them perhaps against another indictment for the same offense. As long as a verdict of guilty remained on the record there was a finding. But what proceeding is there now on it? I consider all the proceedings on the indictment, since the finding by the grand jury, to be set aside at the instance and for the benefit of defendant."

As before stated the States of Kansas, California, Indiana and Kentucky have all held to the same doctrine. See *State v. McCord*, 8 Kans. 232; *People v. Keefer*, *supra*; *Veatch v. State*, 60 Ind. 291; *Commonwealth v. Arnold*, 6 Crim. Law Mag. (Ky.) 61. But it is claimed by plaintiff in error that these decisions were made by virtue of the statutes of those States which provide in substance that when a new trial is granted the parties shall be in the same position as if no trial had been had, some also providing that the first trial and verdict shall not be referred to on the second trial, nor shall the first verdict be pleaded in bar of a conviction on the second trial either in the evidence or argument. It is true, the decisions referred to have in some instances been predicated upon the statutes referred to, and did a similar statute exist in this State much of the trouble in this case would be obviated. But it may also be observed that if the clause in the bill of rights in both the Federal and State Constitutions, that a defendant shall not be twice put in jeopardy of life or limb for the same offense, is to be his protection, as argued by his counsel, it is quite clear that a simple legislative enactment of the States cannot override or take away this protection, and the enactments referred to would be unconstitutional and void, and would form no basis for the decisions. While many courts holding to the doctrine contended for by plaintiff in error have based their argument, to some extent, upon these constitutional provisions, we know of none holding the statutes authorizing a second trial upon the whole indictment void.

Again should we adopt the reasoning of the court in *People v. Gilmore*, *supra*, in holding that the statute meant only that the parties should be in the same position with reference to the undecided issues in the case, then the force of the statutes, as a basis

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for the decisions referred to, is swept away, and the courts of those States may, in effect, be ranked with those so holding, without the aid of a statute. With that view of the case it might well be held, as in the case last referred to, that the statute gave no authority for the decision.

So far as the provision of the Constitution of the United States may be invoked, we take it as pretty well settled now that that provision governs the courts existing by virtue of the laws of the United States, and has no application to the State courts. *United States v. Kern*, 1 McLean, 438; *Barron v. Baltimore*, 7 Pet. 243; *Switchell v. Commonwealth*, 7 Wall. 321; *State v. Wells*, 46 Iowa, 662; *Fox v. Ohio*, 5 How. 410. We hold therefore that the plaintiff in error was properly put on trial for murder in the first degree; the granting of a new trial having the effect of setting aside all the results of the former trial.

[Minor matter omitted.]

We find no error in this record. The judgment of the District Court is therefore affirmed.

Judgment affirmed.

The other judges concur.

NELSON V. JOHANSEN.

(18 Neb. 180.)

Guardian and ward — negligence of guardian.

A female minor, eleven years old, resided with her guardian. Her parents were living, and she went from his house to theirs on a very cold day, and not being furnished by him with sufficient clothing, was badly frozen. *Held*, that he was liable to her in damages, although her act was by the parents' direction and without his knowledge.

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

C. A. Baldwin, for plaintiff in error.

John C. Cowin, for defendant in error.

REESE, J. Plaintiff in error having failed to appear in this cause and having filed no brief, the cause was submitted by defendant in

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error without brief or argument, according to the provisions of rule four of this court, in force at the time the same was filed.

While it could not be expected that without the aid of briefs and arguments of counsel calling the attention of the court to the errors complained of, we can be able to give the case that critical examination which it would otherwise receive, yet we devote to it sufficient attention to examine the questions presented by the record, and ascertain whether such errors appear of record as to require the reversal of the case.

The action in the District Court was brought by defendant in error by her next friend, she being a minor. The petition alleges that in the year 1880, when she was of the age of ten years, her father, by agreement with defendant in error, sent her to the home of defendant in error to reside with and work for his family until the 5th day of December, 1880, and that at that time and upon that day — the weather being very cold — plaintiff in error sent her home across the prairie, a distance of about one mile and a half, so poorly and thinly clad, and so exposed to the inclement weather, that on her way she was badly frozen, so that she was for a long time sick, confined to her bed and suffered great pain, etc., whereby she was greatly damaged, to-wit, in the sum of \$5,000 for which she asked judgment.

The answer of plaintiff in error, after admitting the fact of defendant in error residing with him, and leaving him at the time alleged, denies all improper treatment of defendant in error on his part; alleges that she came to live with him for the term of three years, but at the instigation and by command of her parents left him on the day named without any knowledge on his part as to what clothing she wore, and while he was from home; that she was provided with suitable clothing, some of which she had left at her own home, and pleading such other facts as if established by proof would exonerate him from any charge of cruel or improper treatment of defendant in error. The trial resulted in a verdict and judgment in favor of defendant in error for the sum of \$250

The errors assigned in the petition in error are, that the court erred in giving certain instructions referred to by numbers, and in refusing others which are designated in the same way. Also that the verdict is contrary to law, and is contrary to and against the weight of the evidence in the case. Other general assignments are made in the usual statutory form.

As to the first assignment of error, that the court erred in giving the instructions, six in number, referred to, it is sufficient to say that we have examined them, and do not detect any misstatements of the law or improper directions to the jury.

The instructions refused, and of which refusal complaint is made, are as follows:

“3. If the jury are satisfied from the evidence that at the time the plaintiff, Anna K. Johansen, left the home of the defendant to go home, on December 5, the defendant was not at home, and did not know when he left his home that she was going to leave his place that day, and the defendant did not send her away, the plaintiff cannot recover, and your verdict must be for the defendant.”

“4. The parents of Anna, being her natural guardians, had the right to direct and control her actions, and if the jury shall find from the evidence that on the day preceding the day she left the defendant's her parents told her to come home, and she communicated that to the defendant, and that he thereupon told her that he would rather she would not go, but that he had no power to stop her going, that he did not want her to go, and that she afterward did leave without defendant's knowledge, and by reason of doing so took cold, and was sick, the defendant would not be liable therefor.”

“5. The jury are instructed that if the plaintiff, at the time referred to, left the defendant's by the direction of her parents and against the advice of the defendant, and that by reason of her so going she took cold, and was made sick, the defendant would not be liable for negligence in permitting her to go home under these circumstances under the issues made by the pleadings in this case.”

The petition alleged, and the testimony on the part of plaintiff tended to show, that the suffering of plaintiff was caused by the want of proper clothing for the purpose of protecting her from the rigor of the weather; that it was cold and she was very thinly clad. Her age at that time was about eleven years. So far as the duty of plaintiff in error toward her was concerned he stood in the relation of her parent, and in view of her want of experience and knowledge it was his duty to see that she was properly clothed. If he failed in this, through negligence, he would be liable for the consequences. By an examination of the foregoing instructions it will be seen that they fail to embody this important element in this case. Even if she had gone home without his knowledge, and by the express com-

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mand of her parents, yet it would not relieve him from his duty to exercise proper care over her, and to see that she was properly and as near as might be comfortably clad. For this reason we think the instructions were properly refused.

It is next alleged that the verdict was against the weight of evidence, and was not supported by sufficient evidence.

Upon this branch of the case it is sufficient to say that we have carefully read over and examined all the testimony introduced upon the trial, and find it conflicting and quite difficult to harmonize. In fact there was a sharp conflict between the testimony introduced on the part of defendant in error and that presented by plaintiff in error. If the jury believed the testimony of the witnesses produced by the defendant in error, there was sufficient to sustain the verdict. As to the weight of the testimony they were the judges, and the verdict would not be set aside unless clearly and manifestly wrong.

We are unable to discover any error in the record, and the judgment of the District Court is therefore affirmed.

Judgment affirmed.

The other judges concur.

 BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY v. WEBB.

(18 Neb. 215.)

Railroad — killing cattle — owner's contributory negligence.

Where horses get on an unfenced railway track and are injured by a train, the owner's contributory negligence in allowing them to escape is no defense.*

ACTION for injury to horses. The opinion states the case. The plaintiff had judgment below.

T. M. Marquett and J. W. Dewese, for plaintiff in error.

T. Appleget & Son, for defendant in error.

RESE, J. The original action in this cause was instituted for the recovery of damages resulting from injury to a team of horses

* To same effect, *Congdon v. Cent. Vt. R. Co.* (56 Vt. 890), 48 Am. Rep. 793; *Cressey v. North R.* (59 N. H. 584), 47 Am. Rep. 227

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caused by a train of cars belonging to plaintiff in error. The allegation of the petition in which the injury to the property is charged is as follows: "That on or about the second day of August, 1882, said defendant was operating a railroad through Johnson county, State of Nebraska, said railroad having been open for use for more than six months in and through said county, and while so operating the same at the time above stated and in the day-time, at a place on said road therein where it was required by law to fence its track but had failed to do so, said defendant, by its agents and employees, carelessly and negligently ran an engine and train of cars upon and over one team of horses and one lumber wagon, the same being the property of this plaintiff and of the value of \$283, by reason of which said team of horses was so injured as to be entirely worthless and it became necessary to kill the same."

The answer admits the injury to the horses and that the railroad was not fenced but alleges that the horses were harnessed and hitched to the wagon equipped and ready for travelling as a team and that while so hitched the defendant in error left the team standing near the railroad track without any one to manage and control it and without being secured or fastened while he went away from it, and while it was thus left the train came along, at which the team became frightened and dashed across the railroad track in front of the train and was injured, without any fault or negligence on the part of the plaintiff in error, and that the carelessness and negligence of the defendant in error contributed to the injury complained of. The reply was a denial of the allegations of the answer.

Upon the trial plaintiff in error sought to present to the jury, as a defense, the question of the contributory negligence of the defendant in error, but its prayers for instructions in that direction were refused by the court. This action of the trial court is assigned for error. Two questions are presented for decision. The first contention of plaintiff in error is, that under the issues presented by the pleadings the question of the negligence of both parties was made a prominent one, and that upon the issue so presented the jury was called to pass, and therefore it should have been submitted with proper instructions for their guidance.

By comparing the petition with section 1 of the act of June 22, 1867, which we will presently notice more fully, it will be observed that the pleader brings himself directly within its provisions. The team was injured by the engine of the railroad com-

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pany on the track and at a point where the company was required by law to fence its track, but had failed so to do for more than six months. This, with the other allegations of the petition, constituted a cause of action. The fact that plaintiff in error pleaded a statement of facts which did not constitute a defense, and that these facts were denied did not render it absolutely essential that these immaterial facts or questions (if they were such) should be submitted to the jury.

The whole case must depend upon the second question presented, which is, would the contributory negligence of the defendant in error relieve plaintiff in error from its obligation to pay for the injury done to the horses of defendant in error upon its track at a place where it was unfenced, and where by law the railroad company was required to fence? The section above referred to, is as follows:

“That every railroad corporation whose line of road or any part thereof is open for use shall within six months after the passage of this act, and every railroad company formed or to be formed but whose lines are not now open for use shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities and villages, with openings, or gates or bars at all the farm crossings of such railroads, for the use of the proprietors of lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep and hogs from getting onto such railroad, and so long as such fences and cattle-guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines or trains of any such corporation, or by the locomotives, engines or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep or hogs thereon; and when such fences and guards have been fully and

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duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done." Comp. Stat., ch. 72.

By a fair analysis of this section we think its provisions, as applicable to the case at bar, are, that the railroad company shall erect and maintain fences on the sides of its track, suitably and amply sufficient to prevent horses from getting on the railroad (except at places other than that where the injury occurred), and in case of its failure so to do it shall be liable for any and all damages which shall be done by the engines or trains of the company to any horses thereon. If we are correct in this it is clear that the simple negligence of the owner of the stock injured can be no defense and the ruling of the District Court was correct. It may be said that this construction of the act under consideration would render the railroad company liable for injury to stock when the owner had driven them and left them upon the road. But when we consider the purpose of the act, and give it that reasonable construction which such statutes require, no such conclusion necessarily follows. The maxim that "no injustice is done to the consenting person, that is, by a proceeding to which he consents," would then apply. Besides such an act, if done for the purpose of obstructing the track, would be a violation of the criminal law of the State. It cannot be said that the protection of stock upon a railroad track was the sole object of the law. When we consider that these tracks are incessantly traversed by trains running at a high rate of speed, all of which are carrying persons, and many of which are loaded with passengers, and that it is absolutely necessary to their safety that the track should be kept clear of all obstructions which might endanger their lives, it is apparent that the purpose of the legislature was that first, perhaps, passengers and employees on the train should be protected; and second, that stock near the line of the road might not be destroyed. It was therefore made the duty of the railroad company to fence its road. The language of the statute is that "every railroad corporation whose line of road * * * is open for use shall fence the road."

As said by DENIO, J., in *Corwin v. R. Co.*, 13 N. Y. 54: "Having imposed this general and public duty, the legislature has next proceeded to declare some of the consequences of its omission. The corporation in that case is liable for all damages which shall be done by their agents or engines to cattle, horses or other animals thereon."

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The section under consideration is substantially the same as section 42 of the railroad law of New York, enacted in 1848, which has been construed by the courts of that State substantially as herein held. See *B. & M. R. Co. v. Brinkman*, 14 Neb. 70, and cases there cited.

The question presented in the case last cited was not identical with the case at bar, and called for a construction of section two of the act of 1867, which applies to "live stock running at large." This section is substantially a copy of the Iowa law, and has been repeatedly construed by the courts of that State. But it must be observed that there is a great difference between the provisions of the two sections, and as section 1 of our law is not found in the Iowa act, we cannot look to the decisions in that State for light in its construction.

We are reminded that in construing statutes we are to give force to all their parts, and if section 1 was intended by the legislature to be as sweeping in its provisions as is here contended for, what could be the use of the second section, and why the provision that a railroad company should be "absolutely liable" for stock injured or killed? To this we reply that to our mind the purpose of the second section is, in the main, to afford to the owners of stock running at large a speedy and effectual remedy for the collection of their damages. Stock "running at large" has reference to stock under the control of no person; free commoners, as it is sometimes termed. If stock are running at large, not under the dominion of the owner, there can be no defense to an action brought for damages where they have been injured or killed by trains, at a point where the company were required to fence, but had failed to do so. Again the section provides that certain proceedings may be had for the purpose of ascertaining the value of stock injured or killed, and further, that in case of the failure of the company to pay the value thus found, the measure of damages shall be double the value of the property killed or destroyed. To our mind the provisions of section two may all be given force, and no conflict can be found between the two sections. We are aware that the "double damage" part of section 2 has been held unconstitutional (*A. & N. R. R. Co. v. Baty*, 6 Neb. 37), but that fact even if correct (and upon which we express no opinion) cannot militate against the view here expressed as to the purpose of the legislature in enacting the law.

By the first section it is declared that the company must fence

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its road, that the fences must be amply sufficient to prevent cattle, horses, sheep and hogs from getting on the track and in case of default the railroad company shall be liable for any and all damages which shall be done by the engines or trains running on the road. No allusion is made to any conditions in regard to care or the want thereof, either by the company or the owner of the stock as affecting the liability of the company, excepting in the last clause of the section where it is provided that if the proper fences, etc., are constructed and maintained, the railroad company shall not be liable unless the injury is negligently or willfully done.

We therefore hold that the negligence of defendant in error, if any existed, was no defense to the action, and that the judgment of the District Court must be affirmed.

Judgment affirmed.

MAXWELL, J., concurs: COBB, C. J., dissents.

STATE V. MCCLELLAND.

(18 Neb. 282.)

Constitutional law — evidence of passage of statute.

The certificate of the presiding officer of either branch of the legislature is only *prima facie* evidence of the passage of a bill, and may be contradicted by the journal of the house

MANDAMUS. The opinion states the case.

W. F. Critchfield, for relator.

George D. Meikeljohn, for respondent.

MAXWELL, J. This is an application for a *mandamus* to compel the defendant, who is county clerk of Nance county, to give notice of an election for register of deeds of said county at the election to be held therein November 3, 1885. At the last session of the legislature an act was passed by both branches of the legislature creating the office of register of deeds in counties having not less than fifteen thousand inhabitants. The bill was then enrolled, and the enrolled bill, properly certified by the presiding officers and chief clerks of

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each house, was duly presented to the governor, and by him approved. In the bill that passed the legislature the number of inhabitants in a county entitled to a register of deeds is expressed in figures "15,000." In the bill as enrolled the number given is "1,500." Laws 1885, ch. 41; Comp. Stat., chap. 18, §§ 77 *a—d*. It will thus be seen that the bill providing for a register of deeds in counties having 15,000 or more inhabitants was never presented to or approved by the governor, while the bill actually approved was not passed by either house. The question for determination is: Is the enrolled bill, as certified by the presiding officers of both branches of the legislature, and approved by the governor, the exclusive evidence of what the law is? Or can the court inquire whether the alleged act was in fact passed and is a valid law? The question is presented to this court for the first time, and requires an examination of the authorities relating to the subject.

In *Pacific Railroad v. The Governor*, 23 Mo. 353; s. c., 66 Am. Dec. 673, decided in 1856, a bill to issue the bonds of the State to the amount of \$800,000 to aid in the completion of the railroads of the State was passed by the legislature of Missouri and vetoed by the governor. It was alleged that the bill passed over the governor's objection by the requisite majority and had become a law. The court held, LEONARD, J., dissenting, that the validity of an enrolled statute, authenticated in the manner pointed out by law by the certificate of the presiding officers of the two houses of assembly that it passed over the governor's veto by the constitutional majority, cannot be impeached by the journals showing a departure from the forms prescribed by the Constitution in the reconsideration of the bill. It is said (page 364), "By the common law the statute roll was absolute and conclusive proof of a statute. The record could not be contradicted. It implied absolute verity."

In *Clare v. State*, 5 Iowa, 509, it was held that the original act on file in the office of the secretary of State is the ultimate proof of a statute. The question in that case was between the original statute and an erroneous copy thereof.

In *Duncombe v. Prindle*, 12 Iowa, 2, the object of the action seems to have been to obtain a construction of certain statutes for the purpose of determining whether townships 90-91, ranges 27-30, were within the territorial area of Webster or of Humboldt county, and it was held that the enrolled bill, signed by the presiding officers of the senate and house of representatives and approved by the gover-

nor, was the ultimate and conclusive proof of the legislative will, and *Clare v. State*, 5 Clarke, 509, was cited with approval.

In *Green v. Weller*, 32 Miss. 651, an amendment to the Constitution abolishing the Superior Court of Chancery and transferring full equity powers to the judges of the Circuit Courts, was passed by the legislature submitted to the people of the State and the amendment adopted, and it was held that an enrolled bill, when duly authenticated and signed by the governor, was conclusive evidence of its enactment and that it cannot be impeached.

In *Evans v. Browne*, 30 Ind. 514, the question arose as to the passage of an act by the requisite majority and it was held that an enrolled bill, properly authenticated by the proper officers of the respective branches of the legislature and approved by the governor, was conclusive evidence of its existence as a law.

In *Fouke v. Fleming*, 13 Md. 492, the question involved was the validity of certain statutes affecting bills of sale and mortgages of personal property and it was held in effect that the engrossed bill, signed by the governor, was better evidence of what the law was than the journals of the two branches.

In *People v. Devlin*, 33 N. Y. 269, an action was brought by the attorney-general under a statute to recover from the defendant certain fees and commissions held by him as chamberlain of the city and county of New York. The defense was that after the passage of the act and before its approval by the governor he, at the request of the assembly, returned the bill to it. Section 5 of the act was then stricken out, the bill sent to the senate which denied the authority of the assembly to change the bill. The court held that the assembly had no power to recall the bill nor the governor any power to return it. That "when both houses have thus finally passed a bill and sent it to the governor, they have exhausted their powers upon it except the power of sending it to the governor by the house in which it originated according to parliamentary law." There are expressions in the opinion that the journals could not be resorted to for the purpose of ascertaining whether an act had been passed by the requisite majority or not ; but the question does not seem to have arisen in the case.

In *Pangborn v. Young*, 32 N. J. L. 29, the question involved was the validity of "An act to establish a police district in the county of Hudson and to provide for the government thereof." The case cited in some of its features resembles the one at bar, yet

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the court held that it was not competent for the court to go behind the attestation of the presiding officer of each house and the approval of the governor, and admit evidence that the bill actually passed by the legislature was different from the one submitted to and approved by the governor. These decisions are based principally on the common law, and questions relating to constitutional restrictions are not discussed or but briefly referred to. While at common law the journals of either house are proper evidence of the action of that branch of the legislature upon all matters before it (*Jones v. Randall*, Comp. 17; *Root v. King*, 7 Cow. 613), yet no case has been cited where it has been held that under the common-law power the court would resort to the journals for the purpose of establishing the invalidity of an act properly certified by the presiding officers of each house and approved by the executive.

It must be borne in mind that the parliament of England before its separation into two bodies was a high court of judicature, possessed of the general power belonging to such court; and after the separation the power remained with each body because each was considered to be a court of judicature and exercised the functions of such court. Cooley Const. Lim. (5th ed.) 161. Hence the power of either house of parliament to punish for contempt. Cooley Const. Lim. (5th ed.) 161. *Kilbourn v. Thompson*, 103 U. S. 168. Being a court the record of each house imported absolute verity. In this country however legislative bodies do not possess judicial powers. The records therefore are not those of a court; but are nevertheless primary evidence to show the action of each house upon any matter before it. The Constitution of this and a number of other States requires each house to keep a journal of its proceedings, and publish the same, and provide that "no bill shall be passed unless by the assent of a majority of all the members elected to each house of the legislature. And the question upon final passage shall be taken immediately upon its last reading, and the yeas and nays shall be entered on the journal." It is also provided that "every bill and concurrent resolution shall be read at large on three different days in each house," etc.

It is well known that the object of these provisions was to prevent crude and hasty legislation. The journals must show that a majority of all the members elected to each house voted in favor of the passage of a bill before it can become a law. In this State at least, from its earliest legislature, the rules have required the

reading in each house of the proceedings of the preceding day in order that the journals might be corrected. The certificate of the presiding officer of each house that a bill has been duly passed by the house over which he presided therefore is merely *prima facie* evidence of that fact, and the court may go behind such certificate and inquire into the facts of the case. And this is the view of the Supreme Court of the United States in *Gardner v. Collector*, 6 Wall. 499, where it is said (page 511): "We are of opinion therefore on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

In *Legg v. Mayor*, 42 Md. 220-225, the case of *Gardner v. Collector* is cited with approval. It is said: "While the presumption arising from the proper forms of authentication of a statute is very strong, that the statute was regularly and constitutionally enacted by the legislature, the authorities maintain that such presumption may be overcome by competent evidence, and the statute may be shown to have never been constitutionally enacted. And this court has so decided at the present term in the case of *Berry v. Balt. & Drum Point Railroad*, 41 Md. 446. A valid statute can only be passed in the manner prescribed by the Constitution, and where the provisions of that instrument in regard to the manner of enacting laws are wholly disregarded in respect to a particular act, it would seem to be a necessary conclusion that the act, though having the forms of authenticity, must be declared to be a nullity, otherwise the express mandatory provisions of the Constitution would be of no avail or force whatever.'

In *Spangler v. Jacoby*, 14 Ill. 297; s. c., 58 Am. Dec. 571, it was held that the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the Constitution, and that the signature of the speakers and governor to an act are presumptive that it became a law in pursuance of the Constitution; but that this presumption may be overcome by the journals. To the same effect are *People v. Mahaney*, 13 Mich. 482; *Moody v. State*, 48 Ala. 115; *People v. De Wolf*, 62 Ill. 253; *State*

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v. *City of Hastings*, 24 Minn. 78; *Southwick Bank v. Com.*, 26 Penn. St. 446; *Jones v. Hutchinson*, 43 Ala. 721; *Fowler v. Pierce*, 2 Cal. 165; *People v. Supervisors*, 8 N. Y. 318; *Speer v. Plank Road Co.*, 22 Penn. St. 376; Opinion of the Justices, 35 N. H. 579-584; Opinion of the Justices, 45 N. H. 607-614; Opinion of the Justices, 52 N. H. 622-625; *People v. Pardy*, 2 Hill, 31; *Prescott v. Board of Trustees*, 19 Ill. 324; *People v. Starne*, 35 Ill. 121; *Coleman v. Dobbins*, 8 Ind. 156-157.

In the last case cited, it is said (page 162): "It is said, *arguendo*, in *Purdy v. People*, 4 Hill, 384, that *nul tiel* record cannot be pleaded to a statute; and in support of this position several English authorities are cited. This undoubtedly is the English doctrine, growing out of their peculiar institutions. Their law-making power is omnipotent. Not only the common statute law governing the ordinary relations of life, but the British Constitution itself, is the creature of parliament. In this country legislative bodies are created by the Constitution. Thus every act may be tested by that instrument and declared void if not in conformity to its requirements."

The journals of each house were evidently intended to furnish the public and the courts with the means of ascertaining what was actually done in each branch of the legislature. They are to be treated as authentic records of the proceedings, and the court may resort to them when the validity of an act is questioned upon the ground of the failure of the legislature to observe a matter of substance in its passage, for the purpose of ascertaining whether the constitutional provisions have been substantially complied with or not. The certificate of the presiding officers is merely *prima facie* evidence that an act has been duly passed, and will be overthrown if it appears from the journals that it was not. The necessity for such a provision is apparent, as this is the second act passed at the last session of the legislature which has been before this court where the provisions of the original act were changed and others inserted, apparently without the knowledge of the members. These acts were properly certified when presented to the governor for his approval, but this one at least did not pass. It follows that the act is of no force and effect, and the writ must be denied.

Writ denied.

The other judges concur.

Tatro v. Tatro.

TATRO V. TATRO.

(18 Neb. 385.)

Marriage — divorce — dower.

In a State where divorce allows both parties to remarry, a decree in favor of the wife, with a provision for permanent alimony, bars dower

ACTION of divorce. The opinion states the case.

John P. Maule, for appellant.

J. W. Eller and *F. I. Foes*, for appellee.

MAXWELL, J. This action was brought by the plaintiff against the defendant in the District Court of Fillmore county to obtain a divorce, upon the grounds of cruelty and failure to provide a suitable maintenance. The cause was referred to a referee, who made a report in favor of the plaintiff. The report was confirmed and a decree of divorce rendered, with permanent alimony to the amount of \$2,000, to be paid by installments. The defendant appealed to this court. The plaintiff also appealed from the decree for alimony. Before the hearing the defendant died, and the cause as far as it relates to alimony was revived. It is claimed on behalf of the plaintiff that the decree for alimony is not for a sufficient amount, and also that she is entitled to dower in the estate of the defendant; while on behalf of the defendant's estate it is alleged that the amount of alimony is excessive, and if in addition to it, the plaintiff is entitled to dower in the estate, it will be impossible to raise the amount without her signature to the deeds, the property being exclusively real estate. A considerable amount of temporary alimony was allowed the plaintiff and her attorneys during the pendency of the action, while the costs and expenses of the trial amount to a very large sum. The defendant's property consists entirely of real estate, which, as is well known, is liable to fluctuate in value according as the demand may be brisk or dull. He is shown to have been in debt to a considerable amount, and after deducting the debts the alimony allowed is about equal to one-third the value of the estate, and therefore the court did not err in awarding the same. But it is claimed that notwithstanding the decree

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of divorce the plaintiff is still entitled under the statute to dower in the real estate of the defendant, and this is the principal question in the case. This is claimed under section 23 of chapter 25, Comp. Statutes of 1885, which is as follows: "When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or misconduct or drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to dower in his lands in the same manner as if he were dead, but she shall not be entitled to dower in any other case of divorce."

Under a somewhat similar statute the Court of Appeals of New York held, in *Wait v. Wait*, 4 N. Y. 95, that a divorce for adultery was prospective in its operation, and had no other effect on the marriage relation than such as was declared by statute, and hence that such divorce did not deprive the wife of her right of dower. *Burr v. Burr*, 10 Paige, 25, 26. Under the New York statute however, the defendant found guilty of adultery was prohibited from marrying again during the life-time of the plaintiff. 2 R. S. 146, § 49. This rule seems to have been extended by the courts to other cases of misconduct of the husband.

In this State an absolute decree of divorce, if unappealed from, is final as to the rights of the parties. Our statute neither authorizes nor sanctions the practice of divorcing the plaintiff, and denying a divorce to the defendant. A decree *a vinculo matrimonii* dissolves the marriage and puts an end to the relation of husband and wife, and as a necessary consequence to the right of dower, upon the decease of the husband.

Dower in this State is only allowed to the widow who was the wife of the person dying at the time of his death. Kent says that the next species of life estates created by the act of the law is dower. It exists where a man is seised of an estate of inheritance, and dies in the life-time of his wife. 4 Kent Com. 35; Coke Litt. 30a; 2 Bl. Com. 130. The effect of a divorce is to put an end to all rights of property depending upon the marriage, and not actually vested, such as the right of dower in the wife, etc. *Rice v. Lumley*, 10 Ohio St. 596; *Billan v. Hercklebrath*, 23 Ind. 71; *Given v. Marr*, 27 Me. 212; *Barbour v. Barbour*, 46 Me. 9; *Whitsell v. Mills*, 6 Ind. 229; *Burdick v. Briggs*, 11 Wis. 136; *Miltimore v. Miltimore*, 40 Penn. St. 151. *Stilphen v. Houdlette*, 60 Me. 447. It is presumed

that the court in rendering a decree of divorce will award alimony in proportion to the property of the defendant. This must include all claims of the plaintiff upon the property of the defendant. If either party is dissatisfied with the decree the case may be brought into this court for review; but the final decree is conclusive upon the rights of the parties, and bars the rights of either party to any further claim upon the property of the other. The most that can be claimed for our statute is, that upon the decree of divorce being rendered for any of the causes above named the court may in the nature of alimony award the plaintiff dower in the lands of which her husband was seised at the date of the decree. In such case however the right to dower is not contingent upon the death of the husband, but accrues at once upon the rendition of the decree. Thus in *Smith v. Smith*, 13 Mass. 230, upon a divorce *a vinculo* for the adultery of the husband, it was held that the wife was entitled to dower in the same manner as if the husband were dead, and the same ruling was had in *Merrill v. Shattuck*, 55 Me. 370; *Harding v. Alden*, 9 Me. 140; *Davol v. Howland*, 14 Mass. 219. The question of alimony does not seem to have been considered in these cases. At common law the relation of husband and wife must continue to exist to entitle the wife to alimony, and upon a decree of divorce *a vinculo* or sentence of nullity no alimony could be awarded. The statute however to protect the claims of the wife preserves her right of dower in the lands of her husband in case she obtain a decree of divorce *a vinculo* from him for adultery, misconduct, etc. This right becomes operative at once upon a decree being rendered and not upon the death of the defendant. It is evident however that the object of the statute is to enable the wife to obtain a fair division of the property of her husband and to prevent the defendant from conveying his real estate in fraud of her rights. A married woman may bar her dower by joining in a deed of conveyance of the estate or by a separate deed. She may also be barred by a jointure settled on her with her consent before marriage, or by a pecuniary provision in lieu of dower to which she has assented. She may also elect between her right to dower under the statute and a provision in the will of her husband, but she will not be entitled to claim under both unless that appears to have been the intention. Comp. Stat., ch. 23, § 12, *et seq.* Where the wife accepts any of the pecuniary provisions named in lieu of dower she will be barred thereby. So if upon rendering a decree of divorce the court in decreeing prop-

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erty to the wife in the nature of permanent alimony awards a gross sum, it will be held to include all the property of the husband including the right of dower to which the wife will be entitled. It is a fundamental principle of equity jurisprudence that where all parties in interest are before the court in a case where its jurisdiction is established, it will determine the entire controversy and award full and final relief. This principle has frequently been applied to causes of action which were purely legal in their nature, and where relief could have been granted by a court of law, and particularly is this true under the Code where the distinctions between actions at law and suits in equity are abolished. *Laub v. Buckmiller*, 17 N. Y. 620; *Lattin v. McCarty*, 41 N. Y. 107; *Davis v. Lambertson*, 56 Barb. 480; *Sternberger v. McGovern*, 56 N. Y. 12; Story Eq. Jur., §§ 64, 65; *Turner v. Pierce*, 34 Wis. 658; *McNeady v. Hyde*, 47 Cal. 481. The object is to prevent a multiplicity of suits. A court of equity therefore in awarding permanent alimony to the wife must take into consideration all the circumstances and decree such an amount to the wife as may seem just and proper. But the decree will be final unless appealed from and will determine the rights of the parties to the property in controversy. Where a decree of divorce is granted which is not sought to be reviewed on error or appeal, the parties after the lapse of six months may marry again, and the only purpose of this provision of the statute is to enable either party if aggrieved by the decree to have the cause reviewed in the Supreme Court. Comp. Stat. 1885, ch. 25, § 45. Aside from this restriction it is not the policy of our law to impose restrictions upon the marriage of either of the parties. We therefore hold that a wife on obtaining a divorce for the causes named is entitled to dower in the lands of her husband if she so elect, and the same may be set off as a portion of the husband's estate to which she is entitled. But that if she do not demand her dower and the court makes a division of the property of the husband in her favor in the nature of alimony, it will be held to include her dower right unless a contrary intention appears and the decree will conclude the rights of the parties. As the decree for alimony in this case was for a gross sum, payable by installments, and seems to have been a fair division of the property of the husband, it must be held to include the plaintiff's right of dower in his lands. The decree of the district court is therefore affirmed.

Judgment affirmed.

HAND V. PHILLIPS.

(18 Neb. 502.)

Attorney — costs — attempt to defeat recovery.

Where a statute authorizes an attorney's fee proportioned to the amount of recovery, the debtor may not defeat his recovery to that amount by paying a large portion of the debt just before judgment.

FORECLOSURE. The opinion states the case.

A. W. Crites, for appellant.

George G. Bowman, for appellees.

MAXWELL, J. This action was brought in the District Court of Platte county to foreclose a mortgage upon certain real estate executed by Minerva A. Bailey and Gurdon B. Bailey, on the 18th day of February, 1879. The mortgage contains this provision: "And in case of a foreclosure of this mortgage a sum equal to ten per cent of the whole amount due shall be awarded in addition to the judgment, as an attorney's fee." It is alleged in the petition, in substance, that Phillips purchased the mortgage premises after the execution of the mortgage. No answer was filed by any of the parties, but on the day on which the decree was rendered the attorney for Phillips announced in open court that he had paid into court the sum of \$220 to apply, first, on taxable costs for clerk's and sheriff's fees, and second, on the amount found due on the note and mortgage. The court thereupon found "that all the facts stated in said petition are true; that at the time of the payment of the sum aforesaid into open court there was due from the defendant Gurdon B. Bailey to the plaintiff, upon the note and mortgage set forth in said petition, the sum of \$295 for principal and interest; * * * that there still remains a balance of eighty-eight and three hundredths dollars of the sum so found due as aforesaid to said plaintiff, still unpaid; that a sum equal to ten per centum of said last named sum should be allowed as an attorney's fee, and that the plaintiff is entitled to the relief prayed for by him as to the residue of said \$295, after deducting the sum so paid into court," etc. The sum of \$8.08 was allowed as attorney's fee.

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From the decree refusing to allow an attorney's fee on the entire sum due, the plaintiff appeals. This mortgage was executed before the act of 1879, p. 78, repealing the law providing for attorneys' fees took effect, consequently the contract is in full force. *White v. Rourke*, 11 Neb. 519. The question for determination therefore is did a payment of a part of the mortgage debt immediately preceding the entering of the decree of foreclosure defeat the right to recover attorneys' fees?

The act of February 18, 1873, providing for attorneys' fees, was as follows: "That in all actions for the foreclosure of a mortgage or upon a written instrument for the payment of money only, there shall be allowed to the plaintiff, upon the recovery of judgment by him, a sum to be fixed by the court in addition to the judgment, nor exceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage or other written instrument upon which the action is brought shall in express terms provide for the allowance of an attorney's fee." In a number of cases this court has decided that the attorney's fees allowed by the act were in the nature of costs and to be taxed as such and kept separate from the judgment. *Rich v. Stretch*, 4 Neb. 186; *Hendrix v. Rieman*, 6 Neb. 516; *Heard v. Bank*, 8 Neb. 10; *Dow v. Updike*, 11 Neb. 95. Being in the nature of costs, a portion of them accrued when the petition was filed. The proceedings to foreclose were then instituted. The defendants by failing to answer admitted that the cause of action had been correctly stated and that they had no defense. This being so, could they come into court immediately preceding the entering of the decree with the cause of action confessed upon the record, and pay the entire claim and costs, except the attorneys' fees? It will be observed that the contract is, that "in case of foreclosure of this mortgage a sum equal to ten per cent of the whole amount due shall be awarded in addition to the judgment as an attorney's fee. This contract is to receive a fair construction, one that will carry out the intention of the parties as far as it can be ascertained. The ten per cent is to be computed upon the amount due on the note and mortgage. This presumably is to be determined by the decree, as the facts as to the indebtedness as they existed when the petition was filed are presumed to continue until after the rendition of judgment. If therefore the defendant was indebted on the note and mortgage when the petition was filed to foreclose he ought not to be permitted to take advantage of his own

default by then making part payment to defeat the attorney's fee *pro tanto*. In *Dakin v. Dunning*, 7 Hill, 30, Dunning brought an action of *assumpsit* against Dakin, who immediately after issue joined paid into court a certain sum of money, claiming that was all that he owed the plaintiff. At the trial however the indebtedness was found to exceed the amount paid into court; the defendant insisted that the sum thus paid should be deducted by the jury and a verdict found for the balance only. The case was such that the deduction would have reduced the recovery below the amount necessary to entitle the plaintiff, under the statute, to costs. The court say (page 31): "The consequences that follow from the payment of money into court in a proper case is well settled in England. If the amount brought into court is accepted by the plaintiff in satisfaction of his demand, his costs are to be paid by the defendant, and the cause will thus be ended. But the plaintiff may insist that the amount paid is less than the actual indebtedness, and proceed in the cause to recover the residue. In such case if the sum paid into court is equal to what was due at that time the verdict is to be for the defendant, but if the sum paid is short of that amount the payment is to be allowed as a credit and a verdict found for the balance only, * * * The former practice of the English courts may have been well enough there and worked no injustice to either party, and it might be proper here if our law as to costs was the same as that of England. The sum brought into court belongs to the plaintiff in any event, and in England if he recovers any thing beyond that sum he is entitled to costs. But it is otherwise in this court and in the courts of common pleas of the several counties. The plaintiff's right to costs in these courts often depends upon the amount of the recovery, and that right ought not to be impaired or affected by a payment into court unless the amount thus paid is equal to the whole sum due at the time." And it was held that the verdict and judgment should be for the whole amount of the plaintiff's claim, but that the defendant would be entitled to the benefit of the payment. In other words, that as the statute allowed attorneys certain fees in the nature of costs, proportioned to the amount of recovery, the debtor by paying a part of the debt after the action was commenced could not prevent the attorney from recovering fees upon the entire sum. See also *Hand v. Dinely*, 2 Stra. 1220. *Sheriff v. Hull*, 37 Iowa, 176. This, we think, is the correct rule to be applied in cases of this kind. The

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payment, so far as the attorneys' fees are concerned, is to be applied as though the decree had been rendered, and this will dispose of the objection that the fees were to be fixed by the court upon the recovery of judgment, as the court at that time determines the amount due from the defendant to the plaintiff. But it may be said that the court has a discretion in the premises, and having fixed the fees that this court cannot review the order. In answer to this objection we will say that it clearly appears from the record that the court only allowed fees upon the balance remaining unpaid, and refused to allow the same upon the amount paid immediately preceding judgment. In this we think the court erred. The decree as to attorneys' fees is reversed, as ten per cent does not appear to be an unreasonable fee where the sum recovered is less than \$300, the plaintiff is allowed a sufficient sum with that heretofore awarded to amount to ten per cent on the decree, and the decree as thus modified is affirmed.

Judgment accordingly.

The other judges concur.

COX v. ELLSWORTH.

(18 Neb. 684.)

Evidence — presumption of death from absence.

The death of an absent person may be presumed in less than seven years, from other facts and circumstances than exposure to a probably fatal danger, such as the improbability of and lack of motive for abandoning his home.*

ACTION to reform a deed. The opinion states the case. The plaintiff had judgment below

Austin J. Rittenhouse and William P. Hellings, for appellants.

Alfred W. Agee, for appellee.

COBB, C. J. This is an action in equity brought in the District Court of Hamilton county, by Joshua Cox, plaintiff, against Francis M. Ellsworth and wife, defendants, to reform an error or mistake

* See note, 46 Am. Rep. 761.

in a deed of real estate executed by said defendants to one Mitchel Clement, under whom the plaintiff claims. The alleged error or mistake consisted in a misdescription of the land intended to be described in and conveyed by the deed. The defendants answering denied that there was a mistake or error in the deed, and denied the death of Mitchel Clement, their grantee. The deed under which the plaintiff claims his right in the premises was executed by Sarah J. Clement, widow or wife, and Minnie L. Clement, only child of said Mitchel Clement. This land was purchased and deed received by said plaintiff, and executed by said Sarah J. Clement and Minnie L. Clement on the theory that said Mitchel Clement was deceased prior to the date thereof — November 21, 1881.

The cause was tried to the court, which found all of the issues for the plaintiff, and adjudged, decreed, and ordered the said deed reformed and corrected as prayed by the plaintiff in his petition, etc.

The cause is brought to this court by the defendants by appeal. The case presents two questions:

1. Was there a mistake in the description of the land sought and intended to be conveyed by Francis M. Ellsworth and wife to Mitchel Clement under date June 9, 1875?

2. Was Mitchel Clement deceased prior to November 21, 1881?
[Omitting the first question.]

On the second point, it appears from the record that about five years previous to the date of the conveyance by Sarah J. and Minnie H. Clement to the plaintiff, Mitchel Clement was a man of about sixty-three years of age, married, and had been married about seventeen years, his family consisting of his wife and an only daughter, a bright and intelligent girl of about fifteen; he being of sober and industrious habits, greatly attached to family and home, in easy pecuniary circumstances. He resided with his family in his own house in the village of Forrest, Livingston county, Illinois. His business had been for many years that of purchaser of corn. At this time the active season for that business was just about to commence. He had just finished repairing his cribs and putting in new scales for the purpose of weighing corn. Under these circumstances, in the early part of the month of December, after eating his breakfast in the morning, he as usual left his house and went into the village without expressing his intention of going away anywhere, and without taking any thing with him but his every-day clothes on his back. He never returned, nor did his family or

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friends or any of the citizens of Forrest ever see or hear of him so far as is known, except to learn from the bankers, where it seems he had some money on deposit, at the neighboring town of Fairbury, about five miles distant, who stated to the wife of the missing man that he came into the banking house on that day and drew out his money which he had on deposit there, amounting to about \$1,800. All of his relatives and connections known to his wife and daughter were corresponded with for news of the missing man, and extensive search made by the people of Forrest for his body in case any accident or casualty had befallen him, but all without effect.

Now then, was this evidence sufficient after the lapse of five years, to sustain the finding of the court that Mitchel Clement was dead? By reference to the text-books and cases, it seems to be the settled rule both in England and this country that seven years is the period at which the presumption of continued life ceases. But this period may be shortened by the proof of such facts and circumstances connected with the person whose life is the subject of the inquiry as, when submitted to the test of reason and experience, would force the conviction of death within a shorter period. Under the rule above stated, if any person domiciled in the city of London leaves the place of his residence on a journey of business, health, or pleasure, or simply disappears and does not return, nor is heard of by any person at said city or elsewhere, so far as is known to the authority making the inquiry, until after the lapse of the period of seven years, the presumption that such person is still in life ceases to exist and he is presumed to be dead, without regard to any fact connected with the circumstances, life, or habits of such person. But when the inquiry arises before the expiration of seven years, and the facts and circumstances of the person are proved to have been such as to compel the thoughtful and experienced mind to believe that, if still living, such absent person would have returned to or communicated with his home, wife, children, relatives or friends left behind, or to the care and enjoyment of property abandoned, and that he has never returned, in such case, although the period of seven years has not elapsed, the presumption of continued life may be held to have ceased.

The case of *Tisdale v. Connecticut Mut. Life Ins. Co.*, 26 Iowa, 170, is a strong case and quite in point to the case at bar. This was an action by Mrs. Tisdale against the life insurance company

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upon a policy of insurance on the life of Edgar Tisdale, her husband. Of course, the leading fact to be proved by her was the death of Edgar Tisdale. The case does not show the date of the commencement of the suit, but as the opinion of the Supreme Court was filed December 12, 1868, it is fair to presume that the suit was commenced in the District Court as early as the first of that year. The evidence tended to prove that Edgar Tisdale "was a young man of exemplary habits, excellent character, of fair business prospects, respectably connected, and of the most happy domestic relations. He had the fullest confidence of his friends, and the entire affection of his wife, and was living in apparent happiness, with no cause of discontent with his condition which would have influenced him to break the domestic and social ties with which he was so pleasantly bound to life. Visiting Chicago, September 25, 1866, upon business, he was last seen by an acquaintance on the corner of Lake and Clark streets in that city about 3 o'clock of that day. No trace of him was afterward discovered, though his friends made every effort to find him and ascertain the cause of his mysterious disappearance. A large reward was offered through the newspapers for information that would lead to his discovery either dead or in life. The detective police were employed to search for him, without results. No tidings have been received of him, and not the faintest trace of the cause or manner of his disappearance has been discovered. The District Court instructed the jury that "the law presumes the existence of a person, when duly proved, to continue until the contrary is shown by some sufficient proof, or in the absence of such proof, until a different presumption arises. Such presumption arises in law after the expiration of seven years without any intelligence concerning such person; but upon the issue of the life or death of such person, a jury may find a presumption of death from the lapse of a shorter period than seven years, provided other circumstances concur. These other circumstances must be facts proven or presumed to be true, the existence of which being so established, gives reasonable ground for the presumption of such death; such as, for instance, that such person is proven to have sailed on a voyage which should long since have been accomplished and the vessel in which he sailed has not since been heard from, from which fact the loss of the vessel and those on board will reasonably be presumed; or that such person is shown to have last

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been in a house destroyed by fire, or a tornado, at or so near the time of its destruction as to furnish a reasonable presumption that he perished in it. But in the absence of proof of some such circumstances no amount of probabilities arising from continued absence or neglect to write, or from confidence in the character or habits of the person alleged to be dead, or in his previous declaration of intention, will be sufficient to warrant the presumption of death within seven years, because the law fixes that period for a presumption of death to arise from such circumstances." The jury found for the defendant. In the Supreme Court, BECK, J., in delivering the opinion of the court reversing the judgment of the District Court, said: "The first instruction, announcing the rule that the death of an absent person cannot be presumed, except upon evidence of facts showing his exposure to danger, which probably resulted in death before the expiration of seven years from the date of the last intelligence from him; and that evidence of long absence without communicating with his friends, or character and habits, making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment which can be supposed to influence men to such acts, is not sufficient to raise a presumption of death. The instruction is not in accordance with the true rule of evidence, and is erroneous."

* * * "Any facts or circumstances relating to the character, habits, condition, affection, attachments, prosperity, and objects in life, which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. A rule excluding such evidence would ignore the motives which prompt human actions and forbid inquiry into them in order to explain the conduct of men," etc.

The above case was cited with approval in *Hancock v. Am. Life Ins. Co.*, 62 Mo. 26; also by the Supreme Court of Kansas in *Ryan v. Tudor*, 31 Kans. 366, all cases cited by counsel for appellee

The judgment of the District Court is therefore affirmed.

Judgment affirmed.

The other judges concur

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

ABERCROMBIE V. BUTTS.

(72 Ga. 74.)

Statute of limitations — "acknowledgment."

A memorandum, in the handwriting of a debtor, but unsigned and found among his papers after his death, is not an acknowledgment sufficient to take a debt out of the statute of limitations.*

BILL for accounting. The opinion states the point. Dismissed below.

John I. Hall, for plaintiffs in error.

M. H. Sandwich, J. A. Cotton, A. M. Speer, Boynton & Hammond, Allen & Tisinger, J. H. Hall, for defendants.

BLANDFORD, J. The defendants demurred to the bill filed by plaintiffs in error, among other grounds, because the plaintiffs' claims upon the estate of James Trice, deceased, were barred by the statute of limitations. The court sustained the demurrer on this ground, and dismissed plaintiffs' bill, and this ruling is excepted

* See note, 85 Am. Rep. 417.

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to and error assigned there, and this writ of error is brought to review and reverse the decree dismissing said bill.

To take the case from under the operation of the statute, the plaintiffs rely upon a paper in the handwriting of the intestate, Trice, which was found among his papers after his death. The paper is as follows: "Nancy H. Trice received from her father's estate \$7,160, to be divided equally between her children, each one's share \$550.77. Pay out of J. Trice's estate. Jan., 1876. Aggregate amount of thirteen children, \$20,160.10 "

There was no signature to the paper; on the back of the same there was written in the handwriting of said deceased as follows: "For Nancy Trice's children."

The complainants to the bill were Nancy Trice's children. Nancy Trice was the child of James Gibson, and she had intermarried with said James Trice, and died in 1857. Her father, James Gibson, died in 1853, leaving his last will and testament, by which he had devised and bequeathed to his said daughter, Nancy Trice, certain real and personal property for and during her life, and after her death to her children. Said James Trice was qualified and appointed the executor to the will of said James Gibson. James Trice died in April, 1880; the bill was filed in September, 1880.

The main question in this case is, whether the writing found among the papers of James Trice after his death, unsigned by him, was a sufficient acknowledgment of his indebtedness to complainants, so as to prevent the bar of the statute of limitations of the 16th March, 1869.

The Code, § 2939, provides as follows: "A payment entered upon a written evidence of debt by the debtor, or any other written acknowledgment of the existing liability, is equivalent to a new promise to pay."

It is insisted for plaintiffs that the writing referred to is a written acknowledgment of an existing liability, and sufficient to create a new promise to pay. If this writing had been given to plaintiffs by Trice, or made to any one else for them, then there might be some foundation for the assumption of plaintiffs; but the circumstances stated in the bill show that the writing found among Trice's papers at his death was unsigned by him. He had never made known the same to any one during his life. How can it be said to be an acknowledgment? An acknowledgment is the admission of the truth of any fact. How can it be said that this writing is the

admission of the truth of the facts therein stated, when it was never made known to any one? The paper indicates that the sums mentioned therein are to be paid out of the estate of the writer, and thus it would seem to be testamentary in its character, a something which he wishes done after his death. Not signed or properly attested, it fails as a testament, it is but a bare resolution, which could have no effect until legally declared; it fails as an acknowledgment, because it was never made known by the writer; hence the paper mentioned is not sufficient to create, nor is it equivalent to a new promise.

A question similar to this came before the Supreme Court of Missouri. It was where a person wrote a will in his note-book and signed the same, whereby he directed that out of his estate his wife was to pay all his debts, including a debt due his mother of about \$400. That court says: "A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered either to the creditor or any one else, cannot have the effect of preventing the operation of the statute." *Allen v. Collins*, 70 Mo. 138; s. c., 35 Am. Rep. 416. Chief Justice SHAW, in the case of *Merriman v. Leonard*, 6 Cush. 151, where the acknowledgment of the debt was contained in a mortgage duly executed and acknowledged, which was never delivered to the mortgagee, but was found after the mortgagor's death among his papers, held that it did not amount to an acknowledgment of the debt, or of a willingness or intention to pay, from which a promise could be implied. The deed was never delivered, and was not an instrument by which the signer was bound.

These cases referred to, and which might be greatly multiplied, are much stronger than the case now under consideration; no promise to pay can be inferred from the instrument set out in plaintiff's bill, under the circumstances under which the same was found, and the court below did right in sustaining the demurrer notwithstanding the writing.

[Omitting other points.]

And there was no error in sustaining the demurrer to this bill, and the judgment of the court dismissing the same is affirmed.

Judgment affirmed.

Lewis v. State.

LEWIS V. STATE.

(73 Ga. 164.)

Criminal law — homicide — negligence and cruelty to child.

The death of a child resulting from willful cruelty and neglect on the part of one bound to maintain and care for it is murder, although there was no intent to kill.*

CONVICTION of murder of a child eight or ten years of age by defendant to whom the child had been left and in whose care it had been several years. The death ensued from cruel beating and exposure. The court charged without qualification as to *animus*, that if the conduct of the defendant did contribute to the death of the child, it was criminal and she would be guilty of one or another of the crimes as mentioned — murder or voluntary or involuntary manslaughter; and if his death resulted either proximately or remotely from her conduct in the case then she is guilty of some crime. The court charged fully as to the presumption of innocence, reasonable doubts, etc., and after stating the position of the State and defense, charged as follows: “Judge of the testimony. Did the conduct of the defendant contribute either proximately or remotely to the death of this individual? Did his death ensue from disease of any kind, either congenital, syphilis or other disease? Did it ensue from natural causes? If so, she is not guilty. But if it ensued from her own conduct by a long continuation of conduct on her part, in which she maltreated the deceased, in which she beat him or starved him as charged in the indictment or exposed him to severe or inclement weather without sufficient clothing or food as charged in the indictment, and if his death was brought about by a long series of acts of that character and by nothing else, then you would be authorized to say she is guilty. The indictment charges that starvation is one of the elements that entered into the causes of his death. For one to be guilty of starving another, that one must have the means to supply the person with food and intentionally and willfully withhold it in order to make out a case of starvation. If a person be poor and destitute, lacking in means, lacking in provisions, and by that means

* See note, 86 Am. Rep. 606.

a person under her control suffer from want of food it is not starvation ; it is not criminal starvation at all events ; it is not such as the law pronounces as criminal. If you find that the conduct of the defendant did contribute to the death of the child, then it would be your duty to inquire what grade of crime the defendant committed. Was it murder, voluntary manslaughter or involuntary manslaughter ? If the conduct of the defendant did contribute to the death of the child it was criminal and she would be guilty of one or the other of these crimes as mentioned — murder, voluntary manslaughter or involuntary manslaughter.

C. P. Crawford, for plaintiff in error

C. Anderson, attorney-general, and *J. H. Lumpkin*, for State.

HALL, J. 1. "Death ensuing in consequence of the willful omission of a duty will be murder ; death ensuing in consequence of the negligent omission of a duty will be manslaughter." In *Rex v. Hughes*, Lord CAMPBELL, delivering the opinion of the court of criminal appeal said : "It has never been doubted that if the death is the direct consequence of the malicious omission to perform a duty, as of a mother to nourish her infant child, this is a case of murder. If the omission was not malicious, and arose from negligence only it is a case of manslaughter." Roscoe Cr. Ev. 723, and cases cited. Where a sick or weak person is exposed to cold with an intent to destroy him, this may amount "to willful murder, under the rule that he who willfully and deliberately does any act which apparently endangers another's life and thereby occasions his death shall, unless he clearly prove to the contrary, be adjudged to kill him of malice *prepense*." Roscoe Cr. Ev. 723, and citations. Cases have arisen under this principle where apprentices and prisoners have died in consequence of the want of sufficient food and necessaries, and where the question has been whether the law would imply such malice in the master or jailor as is necessary to make the offense murder. A husband and wife were both indicted for the murder of a parish apprentice bound to the former. Both the prisoners had used the deceased in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed, that in his opinion, the boy died from debility and want of proper food and

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nourishment and not from the wounds he had received. LAWRENCE, J., upon this evidence was of opinion that the case was defective as to the wife as it was not her duty to provide the apprentice with food, she being the servant of the husband, and so directed the jury who acquitted her, but the husband was found guilty and executed. Roscoe Cr. Ev. 724, and citations.

“Huggins the warden of the Fleet appointed Gibbons his deputy, and Gibbons had a servant, Barnes, whose duty it was to take care of the prisoners and particularly of one Arne. Barnes put him in a newly-built room over a common sewer the walls of which were damp and unwholesome, and kept him there forty-four days without fire, chamber-pot or other convenience. Barnes knew the state of the room, and for fifteen days at least before the death of Arne, Huggins knew its condition having been once present, seen Arne and turned away. By reason of the duress of imprisonment Arne sickened and died. During the time Gibbons was deputy, Huggins sometimes acted as warden. These facts appearing on a special verdict, the court were clearly of opinion that Barnes was guilty of murder. They were deliberate acts of cruelty and enormous violations of duty reposed by the law in the ministers of justice, but they thought Huggins not guilty” because he had only seen the deceased once during his confinement and that from this alone it could not be inferred that he knew that his situation was occasioned by improper treatment or that he consented to its continuance. He knew nothing of the circumstances under which the deceased was placed in the room against his consent, or the length of his confinement or how long he had been without the decent necessaries of life. “It was also material that no application had been made to him which perhaps might have altered the case.” Roscoe Cr. Ev. 725.

Where the death ensues from incautious neglect however culpable, rather than from any actual malice or artful disposition to injure or obstinate perseverance in doing an act necessarily attended with danger regardless of its consequences, “the severity of the law,” says Mr. East, “may admit of some relaxation, but the case must be strictly freed from the latter incidents.” 1 East P. C. 226; Roscoe Cr. Ev. 726. These citations have been made almost at random from a vast number of similar cases scattered through the elementary treatises on criminal law and the reports of the decisions upon the subject. The distinction so clearly pointed out by

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them is made by our own Code, § 4327, which provides that where an involuntary killing shall happen in the commission of an unlawful act which in its consequences naturally tends to destroy the life of a human being, the offense shall be deemed and adjudged to be murder.

In the case at bar this law was admirably illustrated in the able, clear and carefully prepared charge which Judge LAWSON gave the jury. Every phase of the case was presented; nothing was omitted that should have been presented, and nothing was presented that ought to have been left out, at least nothing of which the prisoner could complain.

The only exception which the ingenuity and learning of able and zealous counsel could find to it was that there was error in not "qualifying it as to the *animus*; that if the conduct of defendant did contribute to the death of the child it was criminal and she would be guilty of one or the other of the crimes mentioned; murder, voluntary or involuntary manslaughter," and "if his death resulted either proximately or remotely from her conduct in the case then she is guilty of some crime." When taken in connection with the context it will be readily seen that this exception is not well founded. The charge is full and explicit as to the *animus* required to constitute crime in the accused.

[Omitting minor points.]

Judgment affirmed.

AUGUSTA FACTORY v. BARNES.

(72 Ga. 217.)

Evidence — declarations — res gesta.

In an action against an employer for damages by the death of a young child, his servant, caused by his negligence, the declarations of the child, half an hour after the accident, as to the cause and as to the employer's conduct, are competent as *res gesta*.*

ACTION of damages for death of plaintiff's child, caused by negligence. The opinion states the point. The plaintiff had judgment below.

* See *City of Galveston v. Barbour* (62 Tex. 172), 50 Am. Rep. 517.

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Frank H. Miller, for plaintiff in error.

H. D. D. Twiggs and *Salem Dutcher*, for defendant.

HALL, J. This action was brought by the plaintiff to recover compensation for loss of the services of his minor daughter, who was so seriously injured while in the employment of defendant, by the carelessness, inattention and negligence of its agent, as to occasion her death. The trial resulted in a verdict of \$1,000 for the plaintiff, and a motion for a new trial was made on various grounds and refused. The judgment refusing this new trial is here upon bill of exceptions and writ of error for review.

[Omitting other points.]

Testimony was offered and admitted, to the effect that a statement was made by plaintiff's daughter to him, on his return to his home, upon receiving information of her injury, where she had been carried from the factory directly after she had been wounded. It was shown that about a half hour had elapsed between the injury and the statement, and that no officer of the company was present when it was made. She said that they put her on some new frames; that she refused to go on, and Mr. Cason, the second hand, cursed her and told her to go to work; that this frame was different from the old frames, and she did not want to run it; but after he cursed her she went on any how; that they had to "duff" and they stopped the machinery to clean it off, and that Mr. Carter had started it off without giving the signal.

The injury was shown to have been inflicted while she was engaged in cleaning the machinery, and that Carter directed the work of the operatives at this particular frame, and was the person who gave the signal prior to starting it. This statement was objected to because it was not a part of the *res gestæ*, nor could it be considered in the light of dying declarations, but was merely the hearsay testimony of one then dead. It was not offered as dying declarations, but as a part of the *res gestæ*, and if admissible, it is conceded that it was only on that ground; that the statement was made at a different place from that at which the injury occurred and after the lapse of some short time, if there were nothing else connected with it, would hardly afford a plausible ground for its rejection, but considering the circumstances, the terrible suffering the child was then and had been enduring from the frightful injury

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that had so recently occurred, we think a case was presented where a judge should have paused long before rejecting it; the propriety of the rejection would have been, to say the least, doubtful, and in cases where the competency of evidence is doubtful, it should go to the jury, that they may consider how far its force is impaired by these incidents.

The common law, as well as the Code, § 3773, makes declarations accompanying an act, or so nearly connected therewith, in time, as to be free from all suspicion of device or afterthought, admissible in evidence as part of the *res gestæ*. It is scarcely credible that this little girl, while enduring such excruciating pain, perhaps torture would not be too strong a word to characterize it, from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage of gain, or for any other ulterior purpose. Her mind must at that time have been wholly occupied with her own condition; this, it seems to us, would be the reasonable and natural conclusion of any mind not warped by prejudice or biased by some strong motive leading or driving it in the opposite direction. Both the text-writers and the reports furnish numerous instances fully sustaining the ruling in this case. Among many others see 15 Ga. 535; 11 Ga. 615; 47 Ga. 24, 41, 42, 68; 61 Ga. 192; 65 Ga. 94; 67 Ga. 636; *Mullery v. Hamilton*, 71 Ga. 720. There is a very full and satisfactory discussion of the subject in 8 Wall. 397; 1 Greenl. Ev., § 108, and following sections of that learned and valuable work.

Judgment affirmed.

MONTROSS v. STATE.

(72 Ga. 261.)

Criminal law — obscene publication — evidence — other like publications.

On the trial of an indictment for giving away an indecent pictorial newspaper, with intent to circulate it, the defendant will not be suffered to read to the jury articles in other newspapers and showing other pictures publicly displayed in the same city, of a more indecent and demoralizing character.

CONVICTION of giving away an indecent newspaper. The opinion states the point.

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C. D. Hill and *H. C. Glenn*, for plaintiff in error.

W. D. Ellis, solicitor City Court, for State.

HALL, J. The accused was tried in the City Court of Atlanta, found guilty, and sentenced to pay a fine of \$1,000, or in default thereof, to labor for one year on the public works, for giving away an indecent pictorial newspaper, tending to debauch the public morals, with intent to circulate the same, known as the "National Police Gazette." He moved for a new trial, upon various grounds, which motion was overruled, and he excepted, and brought the case here by writ of error.

[Omitting other points.]

We are of opinion that the court did not err in interrupting the accused in making his statement to the jury, for the purpose of prohibiting him from reading to them an article from another newspaper, and also exhibiting to them pictures publicly displayed elsewhere, which he claimed to be of a more indecent character, and as having a more direct tendency to debauch public morals than any thing that appeared in the paper prosecuted. As well might the keeper of a lewd and disorderly house, or the proprietor of a gaming house or tables, claim that he had not violated the law, when called upon to answer for his offense, because others indulged in these nefarious practices openly and with impunity and were not prosecuted for their offenses against public order and decency.

Under the Code, § 4637, the defendant in a criminal case has the right to make to the court and jury a statement, not under oath, to which the jury may give such weight as they may think proper, preferring it to the sworn testimony in the case, in the event they believe it to be true, and this court has in several instances given a wide scope to the subjects which the statement may embrace; but we apprehend that the privilege has never been carried so far as to allow the party to state wholly irrelevant matter, or such as would be violative of every principle and rule of evidence.

The cases of *Loyd v. State*, 45 Ga. 58, and *Coxwell v. State*, 66 Ga. 309, cited by the zealous and able counsel of the defendant as against this limitation of the privilege, in fact sustain it. In the first it is said that "where a prisoner makes a rambling statement, not pertinent to the issue, it is not error in the court to admonish him that he must confine his statement to matters bearing on the

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case;" and in the other, that "the prisoner may be restrained, but should be allowed to state such facts as would be admissible in evidence." To have suffered this defendant to roam through the wide field of vulgar, erotic literature and obscene pictorial illustrations, and to parade before the court and country nude pictures, designed to excite passion, and lascivious and wanton articles taken from the daily press, would not only have been an abuse of the law under which this right is claimed, but would have been pandering to and encouraging the very evil which the statute then being enforced was designed to suppress. No respectable magistrate could for a moment tolerate a spectacle so gross and outrageous.

Judgment affirmed.

 WESTERN AND ATLANTIC RAILROAD V. TURNER.

(73 Ga. 202.)

Master and servant — assault by servant on carrier's passenger.

Where the plaintiff came lawfully upon the cab of a railroad freight train, treating with the conductor for passage, as had frequently been done, and as was still being done at the time of the trial by others, the company will be liable for a violent and malicious assault on him by the conductor.*

ACTION for assault. The opinion states the case. The plaintiff had judgment below.

R. J. McCamy, for plaintiff in error.

S. P. Maddox, T. R. Jones and W. K. Moore, for defendant.

BRANHAM, J. The plaintiff being in Dalton, and desiring to return to his home in Tilton, nine miles south of Dalton, and there being no passenger train there at the time, entered a cab having the usual passenger accommodations, attached to a through freight train then standing near the depot, for the purpose of treating with the conductor for passage to Beardsley's, a water station one mile above Tilton, at which point he was informed by the engineer the train would stop that night. Other persons often went down "on this schedule," and got off at this point. He had thirty cents to pay his fare. The fare without a ticket to Tilton when paid on the

* See note, 42 Am. Rep. 36, and references.

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train was forty cents. The conductor in reply to a polite inquiry of the plaintiff, said he was a little behind time and that he did not expect to stop at Tilton, and that "he did not intend to be bothered with any d——d man that night." The plaintiff said he did not intend to bother him; that he had been unable to get a ticket; that he had money to pay his fare, and came in to see whether he would carry him or not; that the engineer told him he would stop at Beardsley's, and he could walk from there to Tilton. The conductor then said, "he did not propose to be bothered with any G——d d——d man that night." Two of the train hands came in at this time, and one of them told the conductor he knew the plaintiff; that he was a gentleman; requested him to carry him, and authorized the conductor to take out of money of his own, then in the conductor's hands, any additional sum that might be needed for his fare. The conductor replied, "I don't propose to be bothered in here to-night with any G——d d——d son of a b——tch." The plaintiff replied, "I am no G——d d——d son of a b——tch; I am as much of a gentleman as you are." Thereupon the conductor struck him three blows with his lantern, breaking the glass globe, cutting his face and head badly, and cutting an inch gash through his lip to his teeth, and knocking him out of the cab door, across the railroad track, from which he sustained additional injuries. The wound in the lip has never healed.

The jury on the trial of the case found \$700 damages for the plaintiff.

A nonsuit in this case was reversed by this court at the February term, 1883.

Railroad companies are liable for torts committed by their servants in the prosecution and within the scope of their business, whether the same be by negligence or voluntary. Code, §§ 5, 2961; *Gasway v. A. & W. P. R. Co.*, 58 Ga. 216; *Peeples v. B. & A. R. Co.*, 60 Ga. 281; *Georgia R. Co. v. Newsome*, 60 Ga. 494.

The two cases first cited were actions for torts to persons who were passengers. The plaintiff in the case last named was not a passenger.

In this case the plaintiff was lawfully in the cab treating for passage, as had frequently been done, and was still being done at the time of the trial by other persons on the same train; and it therefore stands really within the spirit and reason of the authorities first above cited, as well as in *Newsome's* case.

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The conductor had the right to refuse the plaintiff passage in the cab. Conductors of through freight trains, for sufficient reasons may, if required by the rules of the company or the exigencies of the case, refuse to carry passengers in their cabs or on their trains. Such refusal should be made known in a civil and respectful manner to persons applying for passage thereon. In this case the refusal of the conductor to carry the plaintiff, instead of being expressed in a polite manner, was made known to the plaintiff without the slightest provocation on his part, in profane, vulgar and abusive terms.

It is true, as claimed by the counsel for the company, that it was the duty of the plaintiff to have left the cab when refused passage, within a reasonable time thereafter. We cannot agree with counsel however that the conductor ceased to represent the company and to act within the line of his duty if a sufficient time was given plaintiff to leave the car after being so refused. In such a case the conductor had the right to eject him from the cab and to use such reasonable force as was necessary for this purpose, and there is no error in the charge of the court in this respect as excepted to in the third and fourth grounds of the motion. The duty of the conductor was two-fold : First, if he refused the plaintiff passage to do so in a polite manner, and give him a reasonable opportunity to quit the cab of his own motion. Secondly, if after having done this the plaintiff still refused to leave the cab, then to use such reasonable force as was necessary to eject him therefrom. Whatever the conductor did in relation to either of these matters was, under the facts of this case, clearly done in the prosecution and within the scope of his business, and the company was liable for his conduct, even though it was voluntary. He had no right to insult the plaintiff by the use of vulgar and profane language and abusive epithets, and then without provocation to beat him over the head, in his face and mouth, and knock him out of his cab door with his lantern.

[Omitting minor points.]

Judgment affirmed.

Daniel v. Gibson.

DANIEL V. GIBSON.

(73 Ga. 307.)

Interest — after judgment — statute.

Where a contract specifies a lawful conventional rate of interest, that rate will prevail on a judgment rendered on the contract, that being the "lawful rate" within the meaning of the statute.*

THE opinion states the case.

R. M. Willis, W. S. Wallace, for plaintiff in error.

J. M. Mathews, for defendant.

JACKSON, C. J. The sole question made by this record is this: Does a judgment bear interest at the rate specified in the contract before judgment, if that rate be not beyond the per cent which the parties may legally contract for, or does it only bear that interest which all contracts carry if there be no rate stipulated for in the contract?

At the time this contract was made, it was lawful for the parties to fix any rate of interest thereon, and fifteen per cent was agreed. Code of 1873, § 2051. Seven per cent was then and is still the lawful interest, if the rate be not changed by contract. Code of 1873, § 2050. So that here the question is, does this judgment carry fifteen or seven per cent as its rate of interest?

1. The question is not open in this court. It was decided in *Cauthen v. Cent. Georgia Bank*, 69 Ga. 733. In turning to the original record of that case, of file in this court, we find that this identical point was ruled. The question was, what rate of interest did the judgment bear? And this court, a unanimous bench of three justices, held that the judgment bore that rate which the contract before judgment stipulated. Two justices could not, if we were inclined to do so, review and reverse the principle so decided by a full bench. Code, § 217.

2. But we would not, if we could, because it is the law of this State, by statute, and of course, without regard to the decisions of other courts on the common law or law merchant, or on the statute

* See 84 Am. Rep. 258; s. c., 80 Am. Rep. 47; s. c., 47 Am. Rep. 70.

law of other States, however high their authority, our own statute must control us.

Our Code declares that "all judgments in this State bear lawful interest upon the principal amount recovered." Code, § 2054. What do the words "lawful interest," mean? The section of the Code is codified in part from the act of 1845. Cobb Digest, 393, 394. The second section of that act, on page 394, declares that "any judgment hereafter rendered in any court of this State shall bear interest (so far as regards the principal debt) at the same rate as that borne by the contract upon which such judgment may be obtained." Therefore the words "lawful interest," in the Code mean interest at seven per cent, if the contract stipulates no other rate; but they mean the contract rate, if stipulated and within the lawful limit. In the case where no rate is agreed upon, seven per cent is the lawful interest meant by the Code; in cases where another rate is agreed upon by the contract sued on, the contract rate is the lawful interest in those cases, if not beyond the limit fixed by the statute of force when the contract was made. The act of 1845, in the first section, in effect reduced the rate from eight to seven per cent, and it may be that the second section meant to provide only for judgments on prior contracts at eight per cent; but the principle was established that contract interest should be followed after judgment. And really the Georgia statute is very broad, and broadly construed, it is founded in good reason. Shall a debtor, by failure to pay when his debt is due, and having to be sued to judgment, putting the creditor to the delay and fees of attorneys to sue it to judgment, lessen the interest, when his own laches brought about the necessity of the costs to his creditor? The authorities on the general law rest on the idea that the judgment becomes a debt of record, a new debt, in the nature of a new contract, and hence the old contract is merged in the new, which the law makes, and that bears the interest which its maker, the general law, fixes; but the principle engrafted on our law, or our statute of 1845, makes the judgment part of the original contract, and the same contract rate of interest, the measure of damages for not paying the debt after maturity and after judgment, until paid. Whether the reason be sound, or policy wise, however it is in our judgment the law of Georgia, and as such our duty is to adjudicate and enforce it.

For the general current of authority see 24 Am. Rep. 52, 367,

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and for our own statute law, when this contract was made, see Code of 1874, §§ 2050, 2051; act of 19th of February, 1873. That act declares that the agreed rate of interest in “any bond, note, bill or other contract * * * shall be legal and valid to all intents and purposes, and it shall be the duty of the courts of this State to enforce such contracts,” thus making, it would seem, the contract rate of interest the lawful interest in the case agreed on by contract. If “legal and valid to all intents and purposes” do not mean “lawful,” what do these words mean? They carry the contract rate into every intent and purpose, and thus into the judgment, and make that rate of interest the “lawful” rate declared in section 2054 of the same Code of 1873, and also in the same section of the present Code. The contract of the parties, when reduced to judgment, becomes under our law a contract of record (Code, § 2716), and by the act of 1845, as well as that of 1873, *supra*, the contract for interest at a certain rate becomes the contract of record in the form of a judgment.

But were we wrong in all this reasoning, we could not review and reverse 69 Ga. 733, but two of us presiding; and the principle there ruled must control here, it having been pronounced by a full court.

Judgment affirmed.

MATHIS V. MORGAN.

(73 Ga. 517.)

Surety — conditional delivery of bond.

Where a surety on a bond given to the State as security for a bank depository signs it before another surety, whose name precedes his in the body of the bond, but is forged thereto in the signature, and where the name of the same person, as well as that of another whose name appears before that of the complaining surety in the body of the bond, appears as being signed to an affidavit that they were worth a certain sum, but in fact their names were forged to it; and where the complaining surety intrusts the bond to the president of the bank as an escrow, not to be delivered to the State until these sureties execute it, but the president does deliver it to the governor who is the obligee, the complaining surety is liable thereon.*

THE opinion states the point.

* See 25 Am. Rep. 706; 34 Am. Rep. 780.

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C. Anderson, attorney-general, *Jackson & King*, for plaintiff in error.

Dabney & Fouché, for defendant.

JACKSON, C. J. This is another of the cases arising from the failure of the bank of Rome as a depository of the money of the State. Morgan, one of the sureties on the bond of that bank as such depository, filed a bill against the sheriff of Floyd county to enjoin that officer from proceeding further in the enforcement of levies on the property of this surety, on various grounds set up in the bill and various affidavits therewith submitted to the chancellor in support of the allegations of the bill. The chancellor thereupon, and upon the defenses thereto made by the State, granted the injunction, and the State, through the sheriff, represented by the attorney-general, assigns for error here the grant of that injunction.

[Omitting other points.]

Thus we are brought to the last point, that on which the injunction was granted, the effect of the forgery of Mrs. Deason's signature to the bond upon the rights of this surety. And really that is the only point upon which serious doubt can rest. Taking the sworn allegations in the bill and the amendment for true, is this surety discharged from his obligation to respond by reason of that alleged forgery? We have carefully examined the law thereon in the light of numerous authorities, and extracted from those authorities what we believe principle as well as the stronger current of authority fixes as the law on the facts here alleged, we will apply that law to the facts, and thus see whether or not there is ground for equitable relief, and therefore for the grant of this writ of injunction.

The facts are most strongly presented in the amendment to the original bill. Substantially they are, that complainant signed the bond on the understanding and condition that Frost, Samuel, Prentice and M. P. Deason would sign it as co-sureties; that as evidence of this fact the names of these persons were written and inserted in the bond before complainant's name, when it was presented to him for execution by him, and that he would not have signed it but for that understanding; that at the same time that the bond was presented for his signature, there was presented and shown to him another paper,

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attached to the bond, purporting to be an affidavit signed before a notary public, in which these co-sureties were represented as worth, Frost \$50,000, Samuel \$35,000, Prentice \$25,000, and M. P. Deason \$10,000; that upon the strength of these affidavits and understanding that they would sign the bond, he then signed the affidavit and bond, and would not otherwise have done so; that Prentice was not worth the amount opposite his name, and thus falsely and fraudulently represented to him; that he learned from the affidavit and bond that both Prentice and Deason would sign the bond, and therefore signed it, and would not otherwise have done so; that when he signed it, he left it with Samuel for the purpose of procuring the signature of Prentice and Deason; that it was left with him on condition that it should be signed by the others before delivery to the obligee, and that thus Samuel held the bond as an escrow for the purpose aforesaid, and had no authority to deliver it to the obligee until executed by Prentice and Deason; that up to May, 1883, he believed they had signed the affidavit and the bond, but on that day he heard a rumor that it had not been so signed, and now has ascertained and charges that neither signed the affidavit, and M. P. Deason did not sign the bond nor authorize any one else to sign for her; that these signatures are not the acts and deeds of either Prentice or Deason, but made without their consent or authority; that J. W. & W. L. Smith have bought property from Deason, naming and describing it, and that Simpson & Ledbetter have bought from Samuel, describing it, neither having notice of the fact that either were sureties, and thus the former got good title from the forgery, and the latter as innocent purchasers without notice; that therefore he, the complainant, is relieved as surety on the bond.

These facts make this case: Where a surety or a bond given to the State as security for a bank depository signs it before another surety, whose name precedes his in the body of the bond, and is forged thereto in the signature, and where the name of the same person, as well as that of another whose name appears before complainant's in the body of the bond, appears as having signed an affidavit that they were worth a certain sum, and never made the affidavit at all, but their names were forged to it, and the complainant surety intrusts the bond to the president of the bank as an escrow, not to be delivered to the State until these sureties execute the bond, but the president of the bank does deliver it to the gov-

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ernor, the obligee, with all the signatures apparently genuine thereon, is the complainant surety in such a case relieved and discharged from responding to the State, on the breach of the bond by the bank?

In the case of *Dair v. United States*, 16 Wall. 1, it was held that a bond, perfect on its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties, upon the ground that they signed it on a condition that it should not be delivered, unless it was executed by other persons, who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced to act upon the faith of such bond to his own prejudice.

That case in principle covers this. The only difference in fact is that in that case the persons who agreed to become sureties did not sign the bond as such, and their names were not in the body of the instrument, so as to put the agent of the government on notice or inquiry that something was wrong; whereas in the case before us, the name of her who apparently signed but according to the allegation and proof by the complainant did not really sign, was in the face of the bond. It appeared just as genuine in the signature as in the face of the bond in the case at bar. There was nothing to put the governor on notice or inquiry, but on the paper, the face of the bond, and signatures and witness, everything looked genuine. Mrs. Deason's name was in the face of the bond, but it was also in the signature to the bond. The point on which Mr. Justice DAVIS, in *Dair v. United States*, placed the judgment in that case was, that there was nothing to put the government's agent on inquiry, and he distinguished that case from the case decided by Chief Justice MARSHALL, in *Pauling v. United States*, 4 Cranch, 219; that in the latter case, the persons whose names were in the body of the bond did not sign, and the agent was put on inquiry to ascertain why they had not signed, and thus the government was not innocent. The decision rests on the principle, as old as Lord HOLT, who said in *Hern v. Nichols*, 1 Salk. 289, "Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be loser than a stranger," and which is now embodied in the familiar principle that of two innocent persons, he who enabled a wrong-doer to do

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the wrong should suffer, rather than the other, who put no trust in him, and gave him, by that confidence, no power to do the wrong.

In the case at bar, Morgan is innocent of this forgery, if there was one; so is the governor equally innocent; but Morgan gave the bond to Samuel to be executed by the other sureties, and thus put it in Samuel's power to palm off upon the governor a forged signature as genuine. Instead of carrying out what Morgan expected him to do, he delivered the bond to the governor, not genuinely executed, but forged by somebody, so far as Mrs. Deason was concerned. In *Dair v. United States*, the sureties were held to be estopped from setting up the fact that they signed on the express stipulation that others should sign, because there was nothing to put the agent of the government on inquiry, the names of the others not being in the face of the bond, and the agent acted, and the government acted to its injury, without being affected with notice directly or indirectly, the sureties having put it in the principal's power to do the wrong on which the government acted to its damage. So here the surety, Morgan, put it in the power of Samuel, the president of the bank and principal's agent, to palm off, as genuine, a forged signature upon the State's agent, the governor, when nothing appeared on the face of the bond, or otherwise, to give the governor the slightest notice, or put him on inquiry, that any signature was otherwise than perfectly genuine; and this surety too must be estopped on the same principle.

As the court says in the case of *Dair v. United States*, there seems to be a "conflict of opinion in the courts of this country upon this point," but we conclude, as that court unanimously did, that the decision is "sustained by the weight of authority," and repeat what it said, that "at any rate, it is clear, on principle, that the doctrine of estoppel *in pais* should be applied to this defense." In that case the court cite *State v. Peck*, 53 Me. 284; 31 Ind. 76, and *Weed v. Jewett*, 2 Metc. 608. To those cases we add *State v. Potter*, 63 Mo. 212, where all the cases seem to be thoroughly considered and reviewed, especially *Linn Co. v. Ferris*, 52 Mo. 75, cited by defendant in error here, which is greatly modified, if not, in effect, overruled. That court, in 63 Missouri, conclude that "the agreement of a surety with his principal, that the latter shall not deliver a bond till the signature of another be procured as a co-surety, will not relieve the surety of his liability on the bond, although the co-surety is not obtained, where there is nothing on the face of the

bond, or in the attending circumstances, to apprise the taker that such further signature was called for, in order to complete the instrument. In such case the surety, having invested his principal with apparent authority to deliver the bond, is estopped from denying his obligation to the innocent holder." See also *Ordinary v. Thatcher*, 41 N. J. L. 403, and *State v. Baker*, 64 Mo. 167. In the last named case, the principle was applied to a forged signature of one who was to be a co-surety, and covers fully the case at bar. See too 6 Gray, 90, and Brandt on Suretyships and Guaranty, 358, and cases there cited.

Indeed, since the adjudication in *Lewis v. Board of Commissioners of Roads and Revenues*, 70 Ga. 486, the question is hardly an open one in this court. There we held that, "to permit these sureties, after the bond has been executed and returned, and the commission issued to their principal, who has acted under it, and received and failed to account for the public revenue, to set up as a defense to a proceeding founded on such default, that they stated to the ordinary, who took the bond, that they would not be liable till certain others signed it, would be to allow them to take advantage of their own wrong. They are estopped from so doing." That case is stronger than this, in that the ordinary was the officer or agent to take the bond; but as the governor approved it, and issued the commission, and it was not claimed that "the alleged conditional execution of the bond was ever made known to him," we held the sureties estopped. See also the authorities cited and considered in that case.

So we conclude that however hard this case may bear upon Mr. Morgan, who was made a sufferer by the conduct of the man whom he trusted and whose surety he really became, as the bank could procure none except through its officers of whom Samuel was the chief, yet as the State through its officer, was also perfectly innocent and Morgan put it in the power of Samuel to deceive the State to its great hurt, having acted and put its money in this bank on the strength of this bond and lost it, we must hold him estopped from setting up this defense.

We do not see that the affidavit and forgeries thereon affect the case, as the law requires no justification on the part of any surety, and especially as the governor was equally ignorant of all that conduct; nor do we see how the order in which the sureties' names appear in the face of the bond affect it. The signature of Morgan

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precedes the forged signature. Upon the whole case we conclude that the facts set up, viewing them as true, as set up and proved by complainant's own deposition and those of others sworn on his behalf, make no ground in equity for his relief, and therefore that the injunction was improperly and illegally granted.

Judgment reversed.

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ABATEMENT.

Malpractice.] An action against a surgeon for malpractice abates with the death of the defendant, whatever the form of the action. *Boor v. Lowrey* (108 Ind. 468), 519.

ABDUCTION

See CRIMINAL LAW, 286.

ACTION.

Trover — conversion of capital stock.] Trover lies for conversion of shares of capital stock of a corporation. *Budd v. Multnomah Street Railway Company* (12 Oreg. 271), 855.

See NEGLIGENCE, 47.

AGENCY.

1. **Commercial traveller — implied authority.]** A commercial traveller, authorized in fact only to exhibit samples, and solicit, receive and forward orders, has no implied authority to sell his samples and take pay for them. *Kohn v. Washer* (64 Tex. 181), 745.
2. **For collection — invalid payment.]** A debtor delivered timber to an agent authorized to collect the debt, for the agent's individual use and to be applied on a judgment. *Held*, not a discharge of the debt. *Williams v. Johnston* (92 N. C. 582), 428.
3. **Notice of trust to bank.]** An insolvent firm of commission merchants opened a bank account in their name, adding the word "agents," in order to protect the principal. The bank knew of that purpose. The agents deposited the proceeds of the principal's goods, and on settlement gave him a check to balance. *Held*, that the bank might not charge to that account a debt of the agents, even by their consent. *Baker v. New York National Bank* (100 N. Y. 81), 150.

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See CONSTITUTIONAL LAW, 602.

ASSAULT.

See CRIMINAL LAW, 442.

ASSIGNMENT FOR CREDITORS.

1. **Fraud — innocence of assignee.]** The innocence of the assignee and beneficiaries will not render valid an assignment for the benefit of creditors made with intent to hinder and delay one creditor. *Savage v. Knight* (93 N. C. 498), 428.
2. **In another State — attachment.]** A voluntary general assignment for creditors made in another State, if not in conflict with the laws of Missouri, will convey personal property in Missouri as against subsequent attaching creditors residing there. *Askew v. La Cygne Exchange Bank* (83 Mo. 366), 590.
3. **Preference.]** An insolvent debtor transferred all his property to one creditor, by chattel mortgage, and later by bill of sale and deed, for the benefit of such creditor and another, to the exclusion of all other creditors. *Held*, a violation of the statute forbidding preferential assignments. *Wills v. Walker* (22 S. C. 108), 706.

ATTORNEY.

1. **Costs — attempt to defeat recovery.]** Where a statute authorizes an attorney's fee proportioned to the amount of recovery, the debtor may not defeat his recovery to that amount by paying a large portion of the debt just before judgment. *Hand v. Phillips* (18 Neb. 593), 824.
2. **Woman as.]** A woman may not be admitted to practice as an attorney in Oregon, although she founds her application on a certificate of her admission in Washington Territory. *In re Leonard* (13 Oreg. 93), 823.

BAGGAGE.

See CARRIER, 271, 656.

BANK.

1. **Check — alteration.]** The plaintiff, contemplating an absence for a few days, on April 20 drew his check on the defendant bank, dated April 22; payable to his clerk, and left it with the clerk with directions to draw the money on the 22d, if he did not return before noon, and give it to the foreman to pay off employees. The clerk altered the date to the 21st, drew the money on that date and absconded. The plaintiff did not return until after the time appointed. *Held*, that the defendant might not charge the check to the plaintiff's account. *Crawford v. West Side Bank* (100 N. Y. 50), 152.
2. **National — interest.]** Where the Constitution and statutes of a State fix a legal rate of interest when none is specified in the obligation, but allow the parties to agree upon any rate, national banks can contract for any rate of interest. *National Bank of Jefferson v. Bruhn* (64 Tex. 571.), 771.
3. **— purchase of negotiable instrument.]** A national bank may recover upon negotiable paper purchased by it. *Merchants' National Bank of St. Paul v. Hanson* (33 Minn. 40), 5.
4. **— usury — remedy.]** Where usurious interest has actually been paid to a national bank on the discount and renewal of a series of notes, it may not be set off in an action by the bank on the last of them. *National Exchange Bank v. Boylen* (26 W. Va. 554), 113.

BANK — Continued.

5. Whether depositary or trustee.] A bank in Missouri undertook to lend money on real estate there for plaintiff who resided in New York. The plaintiff sent the bank a check on a New York bank, the sum to be lent, payable to it, to be paid to the borrower when the terms of the loan as to delivery of securities were performed. The bank credited the check to plaintiff on investment account and sent it to its correspondent in New York by whom it was collected and credited to the sender. Meantime the bank led plaintiff to believe that the loan had been perfected, and subsequently made an assignment for benefit of its creditors. *Held*, (1) that the relation was that of trustee and *cestui que trust*, and not that of depositor and depositary; (2) that the bank was liable for wrongfully mixing the proceeds of the draft with its own money. *Harrison v. Smith* (88 Mo. 210), 571.

Savings — managers.] See NEGLIGENCE, 775.

See AGENCY, 150.

BANKRUPTCY.

Discharge — new promise.] A liability discharged in bankruptcy is not revived by the debtor's saying: "I do not intend you shall lose it; I will make it all right" *Meech v. Lamon* (103 Ind. 515), 540.

BILL OF LADING.

See CARRIER, 450; CONTRACT, 267.

BOARD OF HEALTH.

State.] See PHYSICIANS, 565.

See MUNICIPAL CORPORATION, 81; NEGLIGENCE, 764.

BOND.

Conditional delivery.] See SURETY, 847.

BOUNDARY.

See WATER AND WATER-COURSE, 116.

BRIBERY.

See CRIMINAL LAW, 471.

BURIAL.

Dedication — injunction against interference by dedicator.] One who has dedicated land to the public for burial purposes, the dedication having been accepted, may be prohibited from defacing or meddling with the graves thereon, at the suit of any one having relations or friends buried there. *Davidson v. Reed* (111 Ill. 167), 618.

CARRIER.

1. Baggage — merchandise.] A railway company is liable as an insurer for the loss of sample-trunks of a travelling salesman, accepted by it as baggage, when it knew their contents; but only for a reasonable time after reaching the destination. *Hager v. Chicago, etc., R. R. Co.* (68 Wis. 100), 271.

CARRIER — *Continued.*

2. **Bill of lading — goods not received.]** Where a carrier's agent issues a bill of lading for goods which were not delivered for shipment, the carrier may show the non-receipt even as against a *bona fide* transferee for value. *Black v. Wilmington, etc., R. Co.* (92 N. C. 42), 450.
3. **Connecting lines of railroad — joint contract — baggage.]** The sale of a through ticket over two connecting railroads is not evidence of a joint contract by which the second is liable for the loss of baggage by the first. *Felder v. Columbia and Greenville Railroad Co.* (21 S. C. 35), 656.
4. **Contract limiting liability — fraud to induce signing.]** While a contract of carriage limiting the carrier's liability in consideration of reduced rates of freight is valid, and a shipper intelligently, deliberately and without artifice signing such a contract is bound by it, yet he may show in avoidance that he was purposely misled by the carrier's agent, and induced to sign without time for examination, under the false assurance that it was a pass. *Black v. Wabash, St. Louis and Pacific Railroad Company* (111 Ill. 851), 628.
5. **Duty on arrival of goods at destination — special contract.]** A railroad company accepted goods for transportation, executing a bill of lading conditioned that the goods must be removed from the station on the day of arrival, or stored at the owner's risk or expense, and in case of destruction or damage while in the station, no damage should accrue. *Held* (1), that by the legal rule the company was not bound to notify the consignee of the arrival of the goods; (2), that the contract absolved him from such duty in any event. *Gashweiler v. Wabash, St. Louis and Pacific Railway Company* (83 Mo. 112), 558.
6. **Limiting liability.]** Where it is stipulated in a bill of lading that in case of loss or damage the value or cost at the place of shipment shall govern, the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations, interpreted by the carrier to mean "Leaks and outs excepted, \$20 railroad valuation," will not bind the shipper, and he may recover the actual value of the goods at the place of shipment. *Rosenfeld v. Peoria, Decatur and Evansville Railroad Company* (108 Ind. 121), 500.
7. **Payment of excessive charges — action to recover.]** Excessive charges for freight paid to a railroad company for a long course of years voluntarily and without objection may not be recovered. *Killmer v. New York Central and Hudson River Railroad Company* (100 N. Y. 895), 194.

See MASTER AND SERVANT, 842.

CHECK.

See BANK, 152; NEGOTIABLE INSTRUMENTS, 247.

CONCEALED WEAPONS.

See CRIMINAL LAW, 472.

CONSTITUTIONAL LAW.

1. **Defective sidewalks — liability of owners.]** A city charter provided that the owners of land on streets should construct and maintain sidewalks, and further that they should be liable to all persons injured by their failure to keep them in repair and safe for travellers. *Held*, that the latter provision was unconstitutional so far as it imposed a liability to others than the city. *Noonan v. City of Stillwater* (33 Minn. 198), 28.
2. **Evidence of passage of statute.]** The certificate of the presiding officer of either branch of the legislature is only *prima facie* evidence of the passage of a bill, and may be contradicted by the journal of the house. *State v. McClelland* (18 Neb. 286), 814.
3. **"Judge"—surrogate.]** A surrogate is not within the constitutional provision that "no person shall hold the office of justice or judge of any court" after becoming seventy years old. *People v. Carr* (100 N. Y. 286), 161.
4. **Permitting municipal corporations to appeal without security.]** A statute permitting municipal corporations to appeal without giving security as required in other cases is not unconstitutional. *Holmes v. City of Mattoon* (111 Ill. 27), 602.
5. **Requiring fishways in dams.]** The defendant owner of an ancient mill dam procured an act of the legislature authorizing him to raise it or erect a new one. The dam was always of such construction as to prevent the passage of fish. A subsequent statute imposed on dam owners the duty of placing fishways in them. *Held* (1), that the act was constitutional generally, and (2), in respect to the defendant in spite of the prior special act in his case. *Parker v. State* (111 Ill. 581), 648.
6. **Sale of intoxicating liquors — discrimination.]** A statute prohibiting the sale of intoxicating liquors outside of incorporated cities, town and villages, but permitting it in those localities, is not unconstitutional. *State v. Berlin* (21 S. C. 295), 677.
7. **Statute permitting prisoner to waive jury.** A statute enabling a prisoner accused of felony to waive a jury trial is constitutional. *In re Staff* (63 Wis. 285), 285.
8. **Twice in jeopardy — original punishment and civil fine.]** A statute providing in substance that any officer guilty of extortion shall, in addition to being deemed guilty of a misdemeanor, be liable on his bond for five times the illegal fees charged, is not unconstitutional as putting the party twice in jeopardy. *State v. Stevens* (108 Ind. 55), 482.

CONTRACT.

1. **By telegraph, when complete.]** It was agreed between A. and B that A. should go west to buy cattle, and should telegraph to B. the price per head if he purchased; that B. should immediately telegraph "yes" if he was willing to take an interest of one-third in the purchase; that A. was then to telegraph him stating the amount required of him, which he was to deposit in a Chicago Bank to the credit of A. and his brother, so that the latter might draw, and might cause the bank to telegraph A. of the deposit. A. bought the cattle for \$55,000, and telegraphed B. the price per

CONTRACT — Continued.

- head, and B. answered "yes," but the dispatch never reached A. Subsequently B. telegraphed A. to buy the cattle if good, but A. and another had bought them before that dispatch was received. The next day B. arrived and offered to pay his share which was refused. *Held*, that there was no complete contract between A. and B. *Haas v. Myers* (111 Ill. 421), 634.
2. "Carriage" — car.] "Carriage," as an article of freight in a bill of lading, does not include a street railway car. *Cream City R. Co. v. Chicago, etc., R. Co.* (63 Wis. 93), 267.
3. For support.] A contract for "plenty of support" includes attendance and nursing in a prolonged sickness. *Wall v. Williams* (93 N. C. 327), 458.
- Consideration — commissions.] *See* USURY, 717.
- Destruction of subject.] *See* SPECIFIC PERFORMANCE, 688

CORPORATION.

- Joint ownership of ferry — accounting.] A corporation may be a joint owner of a ferry and have an accounting. *Hackett v. Multnomah Railway Company* (12 Oreg. 124), 327.
- See* DAMAGES, 364; NEGOTIABLE INSTRUMENT, 831.

COSTS.

See ATTORNEY, 824.

CRIMINAL CONVERSATION.

1. Evidence of marriage.] In an action of criminal conversation the marriage may be proved by witnesses of the ceremony or by the parties. *Jacobson v. Siddall* (12 Oreg. 280), 360.
2. Effect on relations of parties.] Where the intercourse was forcibly obtained, the plaintiff may show the effect of it upon the wife's body and mind, and may also show the terms upon which he and the wife lived together. *Id.*

CRIMINAL LAW.

1. Abduction — "taking."] Under a statute punishing the taking of a female under sixteen for the purpose of prostitution, there can be no conviction on her unsupported testimony, and where there is no proof of persuasion, but only of permission. *People v. Plath* (100 N. Y. 590), 236.
2. Assault.] The defendant unlawfully untied and was driving away the prosecutor's cow, and facing the prosecutor with a cocked gun in his hand and his finger on the trigger, but not pointing it at the prosecutor, he declared that he would kill any one who interfered and laid hands on the cow. *Held*, an assault. *State v. Horne* (92 N. C. 805), 442.
3. Attempt — to impede justice.] An indictment alleged in substance that the defendant unlawfully furnished A. money for the use of B. to induce B. unlawfully to absent himself as a witness on the trial of an indictment against the defendant. *Held*, bad for not stating a payment or offer of payment by A. to B. for that purpose. *State v. Baller* (26 W. Va. 90), 66.

CRIMINAL LAW — *Continued.*

4. **Carrying pistol.]** The defendant bought a pistol, carried it to his home eight miles distant, and on the way discharged it. *Held*, not a case of "carrying" a pistol, within the statute. *Pressler v. State* (19 Tex. Ct. App. 52), 388.
5. **Concealed weapons — "his own premises."]** A mere servant, hired by the prosecutor to assist him in the cultivation of his land, being on such land is not "on his own premises," within the statute against carrying concealed weapons. *State v. Terry* (98 N. C. 585), 472.
6. **Evidence — attempt to bribe.]** On the trial of a criminal action it is competent to show that the defendant attempted to bribe one of the jury, although that is a distinct offense. *State v. Case* (98 N. C. 545), 471.
7. **Homicide — former conviction of assault — subsequent death.]** A conviction of assault is not a bar to a subsequent indictment for murder where the victim subsequently dies from the effects of the assault. *Johnson v. State* (19 Tex. Ct. App. 453), 385.
8. — **negligence and cruelty to child.]** The death of a child resulting from willful cruelty and neglect on the part of one bound to maintain and care for it is murder, although there was no intent to kill. *Lewis v. State* (72 Ga. 164), 885.
9. — **negligence.]** Where one unintentionally kills another by the careless use of a pistol in sport, it is manslaughter, although the victim told him to shoot. *State v. Vines* (98 N. C. 493), 466.
10. — **evidence — opinion.]** A witness may not give his opinion whether a shooting was accidental. *Id.*
11. — **declarations — res gestæ.]** On a trial for murder it was shown that the deceased stated to the witnesses that he had just seen the defendant going down a slough, about one hundred yards distant, with a shotgun. Three or four minutes later the sound of a gun was heard and going to the slough the witnesses found the deceased mortally wounded with buck shot, and he then stated to them that the defendant shot him. *Held*, that both declarations were competent as *res gestæ*. *Washington v. State* (19 Tex. Ct. App. 521), 387.
12. — **to prevent felony.]** The defendant had been sent by railway managers to guard the track and arrest parties putting obstructions on it, with the promise of a reward for the arrest and conviction of such parties or for the killing of them while attempting to wreck a train. He shot and killed the deceased while he was in the act of putting an obstruction on the track, but at a time when no train was due. The act of obstruction was a statutory felony. *Held*, that the defendant's act was murder. *Weaver v. State* (19 Tex. Ct. App. 547), 389.
13. — **verdict of higher degree on second trial.]** On an indictment for murder in the first degree the defendant was found guilty in the second degree. He appealed and got a new trial, and then pleaded former acquittal of murder in the first degree. The plea was held bad, and on the second trial he was found guilty in the first degree. *Held*, valid. *Bohanan v. State* (18 Neb. 57), 791.

CRIMINAL LAW — *Continued.*

14. **Indictment — signing.]** An indictment is sufficiently “signed” by the prosecuting attorney, when his name with his official title is printed at the bottom with his sanction. *Hamilton v. State* (103 Ind. 96), 491.
 15. **Obscene publication — evidence — other like publications.]** On the trial of an indictment for giving away an indecent pictorial newspaper, with intent to circulate it, the defendant will not be suffered to read to the jury articles in other newspapers and show other pictures publicly displayed in the same city, of a more indecent and demoralizing character. *Montrous v. State* (72 Ga. 261), 840.
- Statute permitting waiver of jury.]** See CONSTITUTIONAL LAW, 285.
- Twice in jeopardy.]** See CONSTITUTIONAL LAW, 482.

DAMAGES.

1. **Exemplary.]** A corporation may not be charged with exemplary damages for the wrongful act of its servant, unless it directed or ratified it, or was grossly negligent in the employment of a servant. *Sullivan v. Oregon Railway and Navigation Company* (12 Oreg. 392), 864.
2. **Breach of contract — avoidable not recoverable.]** Where one has employed an agent to procure insurance on his property, and knows of his neglect to do so in ample time to procure it himself, he cannot hold the agent for a loss by such neglect. *Brant v. Gallup* (111 Ill. 487), 638.
3. **Measure of, on failure of title to chattel sold.]** Where a single bill of chattels is sold and title fails as to a portion, the measure of damages is the difference between the value of the entire quantity and the value of the remainder. *Hoffman v. Chamberlain* (40 N. J. Eq. [13 Stew.] 663), 783.
4. **Prospective — nuisance.]** In an action for turning surface-water on the plaintiffs' lands, *held*, that evidence of prospective damage was incompetent. *Hargreaves v. Kimberly* (26 W. Va. 787), 121.

DECLARATIONS.

See CRIMINAL LAW, 387; EVIDENCE, 864, 888.

DEDICATION.

See BURIAL, 613.

DEED.

1. **Covenant of quiet enjoyment — overflowing.]** Where the owner of land on a stream conveys it with a covenant of quiet enjoyment, and a lower owner, by virtue of a paramount right, raises his dam and floods the land so conveyed, this is a breach of the covenant. *Scriefer v. Smith* (100 N. Y. 471), 224.
2. **Registration — quit-claim.]** One who takes under a quit-claim deed is not protected as a *bona fide* subsequent purchaser, under the recording acts. *Thorn v. Newsom* (64 Tex. 161), 747.

DEVISE.

See WILL.

DIVORCE.

See MARRIAGE.

DOWER.

In leasehold lands — estoppel.] A lessee for 999 years conveyed the premises as in fee-simple. *Held*, that the grantee was not estopped to show as against his grantor's widow's claim of dower, that the grantor had but a leasehold estate. *Whitmire v. Wright* (28 S. C. 446), 724.

See MARRIAGE, 402.

EASEMENT.

Servitude imposed by owner — severance — implied continuance.] A mortgagee of a lot upon which there is a house and appurtenances resting partly upon an adjoining strip of ground owned by the mortgagor, and inclosed by the same fence, but not described in the mortgage, on acquiring title by foreclosure and sale, acquires an easement to the use of so much of such strip of ground as is reasonably necessary. *John Hancock Mut. Life Ins. Co. v. Patterson* (108 Ind. 582), 550.

ELECTION.

Two on same day — priority.] A township election was duly called, pursuant to statute, in June, 1870, on the question of a donation for railroad aid, and held on the 2d of July, 1870, and the donation was voted. On the same day a new Constitution and a separate article prohibiting municipal aid to railroads were submitted to the people, and adopted. The same judges and clerks conducted both elections, but separate ballot-boxes, poll-books and tally-lists were used. Both elections were opened and closed on the same time. The polls at general elections were required by law to be opened at 8 A. M., and closed at 6 P. M., unless the judges should decide to keep them open longer, not later than midnight. The schedule to the Constitution required the polls on the question of adoption to be kept open till sun-set. The polls in this instance were kept open till about sun-set. *Held*, that it could not be said that the donation was adopted prior to the adoption of the prohibitory article of the Constitution. *People v. Town of Bishop* (111 Ill. 124), 605.

ESTOPPEL.

Satisfaction of mortgage written over signature in blank.] A mortgagee indorsed his name with his seal on a mortgage, and parted with its possession. A satisfaction of the mortgage was thereafter written above his signature, without his knowledge, and duly recorded. *Held*, that an innocent subsequent purchaser was protected against the mortgage. *City Council of Charleston v. Ryan* (22 S. C. 339), 718.

See DOWER, 724; MARRIAGE, 258; WILL, 810.

EVIDENCE.

1. Burden of proof — doing business without license.] On a prosecution for violating an ordinance by doing business without a license, the prosecutor need not show the absence of the license, but it is incumbent on the de-

EVIDENCE — *Continued.*

defendant to show that he had a license. *Information against Oliver* (21 S. C. 818), 681.

2. **Declarations — res gestæ.]** In an action for unlawful ejection from a railway train, the description of the occurrence given by the plaintiff, to a third person, immediately afterward, in the absence of the defendant's agents, is incompetent. *Sullivan v. Oregon Railway and Navigation Company* (12 Oreg. 892), 864.
3. **——.]** In an action against an employer for damages by the death of a young child, his servant, caused by his negligence, the declarations of the child, half an hour after the accident, as to the cause and as to the employer's conduct, are competent as *res gestæ*. *Augusta Factory v. Barnes* (72 Ga. 217), 838.
4. **Expert — hypothetical question.]** In putting a hypothetical question to an expert the party may assume as proved all that the evidence tends to prove, although the court may not regard it as proved. *Quinn v. Higgins* (63 Wis. 664), 805.
5. **Handwriting — expert — comparison.]** On the question of the genuineness of the signature of a note in suit, an expert witness, who has never seen the defendant write, may not testify to his opinion founded on a comparison with the defendant's signature of the plea in the suit. *Springer v. Hall* (83 Mo. 698), 598.
6. **Letters and telegrams.]** The presumption is that letters properly directed and mailed were received, and the same is true of telegrams given to a telegraph company for transmission, and properly addressed, and the presumption becomes conclusive when not denied. *Oregon Steamship Company v. Otis* (100 N. Y. 446), 221.
7. **Presumption of death from absence.]** The death of an absent person may be presumed in less than seven years, from other facts and circumstances than exposure to a probably fatal danger, such as the improbability of and lack of motive for abandoning his home. *Cox v. Ellsworth* (18 Neb. 664), 827.

Opinion.] See CRIMINAL LAW, 466.

See CRIMINAL CONVERSATION, 360; CRIMINAL LAW, 387; SLANDER, 720; TRIAL, 14.

EXECUTOR AND ADMINISTRATOR.

1. **Action on their own contract — counter-claim.]** In an action by an administrator on a contract made with him in that capacity, the defendant may not set off or counter-claim a demand due from the intestate to him. *McLaughlin v. Winner* (63 Wis. 120), 273.
2. **Diligence in collecting.]** To secure a debt due an estate, an administrator made a further loan and took a mortgage to cover the whole. The debtor was embarrassed; the original debt could not probably have been collected, and the debtor refused to secure it without a further advance. The debtor became insolvent and the mortgage proved insufficient. *Held*, that the administrator was not liable for the loss. *Torrenco v. Davidson* (92 N. C. 487), 419.

EXECUTION.

1. "Wagon" — dray.] A dray is exempt from execution as a "wagon." *Cons v. Lewis* (64 Tex. 381), 767.
2. "Wearing apparel" — watch.] A watch may be exempt from execution as "wearing apparel," upon affirmative proof that the amount of exemption is not exceeded. *Stewart v. McOlung* (12 Oreg. 481), 874.

FERRY.

See CORPORATION, 327.

FISHWAYS.

See CONSTITUTIONAL LAW, 643.

FIXTURES.

1. Mortgage — casks, tubs and cooler in brewery.] Casks and hogsheads and fermenting tubs and a copper cooler, not fastened to the freehold, are not fixtures of a brewery, subject to a mortgage of the land. *Wolford v. Baxter* (33 Minn. 12), 1.
2. Railway embankment built by consent of life-tenant.] A railway company, by license of the life-tenant, entered upon land and constructed its road, and used it without objection during his life. On his death, on condemnation proceedings, *held*, that the company was not liable to pay for the structures it had so placed on the land, as they did not become the property of the owner in fee. *Chicago and Alton Railroad Company v. Goodwin* (111 Ill. 202), 622.

See LANDLORD AND TENANT, 509.

FRAUD.

See CARRIER, 628; MORTGAGE, 157; SALE, 446, 684

GUARDIAN AND WARD.

Negligence of guardian.] A female minor, eleven years old, resided with her guardian. Her parents were living, and she went from his house to theirs on a very cold day, and not being furnished by him with sufficient clothing, was badly frozen. *Held*, that he was liable to her in damages, although her act was by the parents' direction and without his knowledge. *Nelson v. Johansen* (18 Neb. 180), 806.

HABEAS CORPUS.

When does not lie to review final judgment.] Where a statute authorizes imprisonment in the penitentiary or imprisonment in jail and a fine, and a court adjudges imprisonment in the penitentiary and a fine, the defendant is not entitled to discharge on *habeas corpus* until he has served the term of imprisonment. *Ex parte Mooney* (26 W. Va. 36), 59.

HANDWRITING.

See EVIDENCE, 598.

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HOMICIDE.

See CRIMINAL LAW, 885, 887, 889; 406; 893.

HUSBAND AND WIFE.

See MARRIAGE.

IMPROVEMENTS.

See PARTITION, 702.

INDICTMENT.

See CRIMINAL LAW, 491.

INJUNCTION.

Against trespass. The defendant repeatedly tore down a fence or gate and drove over the plaintiff's lands, claiming that the place was a public highway by dedication and use. *Held*, that an injunction should not issue. *Smith v. Gardner* (12 Oreg. 221), 342.

See BURIAL, 618; MUNICIPAL CORPORATION, 279; TAXATION, 94; WATER AND WATER-COURSE, 206.

INNKEEPER.

Guest.] The plaintiff, who lived in the same town with and very near the defendant's hotel, went there at midnight with a disreputable woman, registered as "C. and wife," and was assigned a room. At the same time he delivered to the clerk some money for safe-keeping. The clerk absconded with the money. *Held*, that the plaintiff was not a guest, and could not recover the money from the innkeeper. *Curtis v. Murphy* (63 Wis. 4), 242.

INSURANCE.

1. Agent — notice.] The plaintiff procured insurance from the defendants through a firm of insurance brokers. The policy was subject to cancellation on notice, and provided that any person other than the assured procuring the policy should be deemed an agent of the assured and not of the company in any transaction relating to the insurance. *Held*, that notice of cancellation to the brokers, the plaintiff being ignorant thereof, was of no effect. *Hermann v. Niagara Fire Insurance Company* (100 N. Y. 411), 197.

2. Assignment — pledge.] A pledge of an insurance policy as collateral security is not an assignment within the prohibition of the policy. *Griffey v. New York Central Insurance Company* (100 N. Y. 417), 202.

3. Interest in life.] A grandfather insured his life for the benefit of his grandson with whom he lived. *Held*, valid. *Elkhart Mutual Aid, Benevolent and Relief Association v. Houghton* (108 Ind. 286), 514.

INTEREST.

1. After judgment — statute.] Where a contract specifies a lawful conventional rate of interest, that rate will prevail on a judgment rendered on the contract, that being the "lawful rate" within the meaning of the statute. *Daniel v. Gibson* (72 Ga. 387), 845.

INTEREST — *Continued.*

2. After maturity.] A sealed note payable one day after date, "with interest at the rate of two per cent a month," bears that interest after maturity. *Piester v. Piester* (22 S. C. 189), 711.

After maturity.] See NEGOTIABLE INSTRUMENT, 744.

See BANKS, 771; NEGOTIABLE INSTRUMENT, 80; USURY, 717

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 677

JAIL.

See NUISANCE, 454.

JOINDER OF ACTIONS

See NUISANCE, 780.

JUDGMENT.

Assumption — conveyance of land — mortgage — sheriff's sale — merger — subrogation — equity — contract — negligence.] The owner of land on which there were judgment liens sold it to B., who assumed the payment of such judgments as a part of the purchase-price. Without paying such liens, B. quit-claimed the land to C., who did not assume them. C. mortgaged the land to X., and after the mortgage was recorded he conveyed it by warranty deed to W., who had no actual knowledge of the X. mortgage, and who assumed the payment of the judgments. Subsequently W. discovered the mortgage, and instead of paying the judgments he allowed the land to be sold on them and obtained sheriff's deeds. *Held*, that by the assumption W. became the principal debtor and primarily liable to pay the judgments. *Birke v. Abbott* (108 Ind. 1), 474.

See HABEAS CORPUS, 59; INTEREST, 845.

JURY.

See CONSTITUTIONAL LAW, 285.

LANDLORD AND TENANT.

Renewal of fixtures — new lease.] The right of a tenant to remove trade fixtures does not extend to the term of a new lease not providing for the removal. *Hedderich v. Smith* (108 Ind. 203), 509.

LEASE.

See DOWER, 724; LANDLORD AND TENANT

LEGACIES.

See WILL.

LIBEL AND SLANDER.

1. Actionable words — damages.] Defendant sent to a newspaper, as an advertisement, a false statement that he wanted the plaintiff to pay a bill. The publisher put it among other "wants," one of which called for a "dead-head." A third person cut the advertisement out, pasted it on a postal card, and sent it to a young woman engaged to be married to the plaintiff.

LIBEL AND SLANDER — *Continued.*

Held, libellous, and that it was a question of fact whether the sending of the postal card was a natural consequence of the publication. *Zier v. Hoffin* (33 Minn. 66), 9.

2. **Actionability of words per se.]** Falsely to say of another that he is a thief is actionable *per se*, although it does not necessarily impute a felony. *Quigley v. McKee* (12 Oreg. 22), 320.
3. **Variance as to words charged.]** It cannot be said, as matter of law, in an action of slander, that there is any substantial difference between the words charged, "public whore," and the words proved, "whorish bitch." *Zimmerman v. McMackin* (23 S. C. 372), 720.
4. **Degree of proof.]** It is not necessary in slander to prove the words beyond a reasonable doubt. *Id.*

LICENSE.

Burden of proof.] See EVIDENCE, 681

MALPRACTICE.

See ABATEMENT, 519

MARRIAGE.

1. **Divorce — alimony — dower.]** A decree in an action for a limited divorce that the husband shall pay a gross sum to the wife and be discharged from all further liability for her support does not bar dower. *Taylor v. Taylor* (93 N. C. 418), 460.
2. **— dower.]** In a State where divorce allows both parties to remarry, a decree in favor of the wife, with a provision for permanent alimony, bars dower. *Tatro v. Tatro* (18 Neb. 395), 820.
3. **— devise in fee — executory devise over.]** A will devised land to T. S. and his lawful heirs begotten of his body, and in case of his dying without such, "to return to J. and C. P. or their lawful heirs begotten of their body." T. S. dying without having had issue, *held*, that his widow was still entitled to dower. *Pollard v. Slaughter* (92 N. C. 72), 402.
4. **Husband's succession to intestate wife's personalty.]** When a married woman dies intestate, and without descendants or ancestors, her personal property goes to her husband at common law, and this rule has not been changed by the various modern Married Women's Acts. *Robins v. McClure* (100 N. Y. 328), 184.
5. **Nuisance on land of wife — her liability.]** A married woman who has real estate separately settled on her, the legal title being in her husband as trustee, is liable for an injury received by one by falling through a coal hole in the sidewalk, suffered to be out of repair. *Merrill v. City of St. Louis* (88 Mo. 244), 576.
6. **Presumption — estoppel by divorce.]** J. took R. to wife in 1860, and very soon permanently deserted her. In 1864 J. married the plaintiff. In 1868 J. and the plaintiff separated. In 1870 while living near J. the plaintiff publicly married W. Subsequently the plaintiff got a divorce against J. by default for desertion. *Held*, in this action for dower in the estate of

MARRIAGE — *Continued.*

W., (1) that the presumption was against the validity of the marriage of 1864; (2) that the plaintiff was not estopped from showing that that marriage was void. *Williams v. Williams* (63 Wis. 58), 258.

MASTER AND SERVANT.

1. **Assault by servant on carrier's passenger.]** Where the plaintiff came lawfully upon the cab of a railroad freight train, treating with the conductor for passage, as had frequently been done, and as was still being done at the time of the trial by others, the company will be liable for a violent and malicious assault on him by the conductor. *Western and Atlantic Railroad v. Turner* (72 Ga. 292), 842.
2. **Contributory negligence — fellow servants.]** An employee of a railway company was sent on a wrecking train in charge of one person as engineer and conductor. In violation of the rule of the company he rode on the engine. By the negligence of the engineer an accident occurred by which he was killed, in consequence of his position on the engine. *Held*, (1) that he was guilty of contributory negligence; (2) that he and the engineer and conductor were fellow-servants, and no action would lie. *Abend v. Terre Haute and Indianapolis Railroad Company* (111 Ill. 208), 616.
3. **Negligence — foreign freight car.]** A railway brakeman was killed in trying to couple a freight car from another road, to a caboose, by reason of the difference in height of the couplings, which was apparent. *Held*, that his employer was not liable. *Kelly v. Abbot* (63 Wis. 307), 292.
4. **— low railroad bridge.]** Where a brakeman on the top of a train, in the day-time, was struck and killed by a low bridge with which he was well acquainted, the company is not liable, although it had not erected danger signal cords. *Hooper v. Columbia and Greenville Railroad Company* (21 S. C. 541), 691.
5. **— dangerous employment — fellow-servants.]** The plaintiff, in the employ of a railway company, went under a car standing alone on a repair track, by order of his foreman, to repair it, and was there injured by the starting of the car by an advancing train. The defendant had provided a watchman to guard the plaintiff from danger. *Held*, that the defendant was not liable for the watchman's neglect of his duty. *Luebke v. Chicago, Milwaukee and St. Paul Railway Company* (63 Wis. 91), 266.
6. **Railroad car-inspector and car-coupler.]** A railroad car-inspector and car-coupler are not fellow-servants. *Tierney v. Minneapolis and St. Louis Railroad Company* (33 Minn. 311), 85.

MISTAKE.

Reformation — negligence.] In the absence of mutual mistake, fraud or concealment, the court will not grant reformation of an instrument, even as between the parties, where the plaintiff executed it without reading it, it having been sent to him by his attorney, and he supposing it was a copy of a different instrument previously executed by him. *Kennerty v. Missan Phosphate Company* (21 S. C. 226), 669.

See VENDOR AND PURCHASER, 89.

MORTGAGE.

1. **Chattel — fraudulent — title of purchaser.]** A purchaser in good faith on foreclosure of a chattel mortgage made to defraud creditors gets good title. *Zoeller v. Riley* (100 N. Y. 102), 157.
2. — “instrument in nature of.”] A merchant bought an iron safe, with his name painted on it, and gave in payment notes, specifying that “in accordance with the terms of an agreement for the purchase of the safe, said vendors do not part with any title thereto until the purchase-money has been fully paid.” *Held*, that the notes were “instruments in the nature of a mortgage,” under the statute, and required to be recorded to be valid as against subsequent creditors or purchasers in good faith. *Herring v. Cannon* (21 S. C. 212), 661

Satisfaction.] See ESTOPPEL, 718.

See EASEMENT, 550; FIXTURES, 1; SHIP AND SHIPPING, 436.

MUNICIPAL CORPORATION

1. **Drains and culverts — surface water — injunction.]** A city may not be enjoined from constructing drains and culverts in streets, merely because they will increase the flow of surface water upon the land of a complainant lot owner. *Heth v. City of Fond du Lac* (63 Wis. 228), 279.
2. **Gutters — surface water.]** A city, for unskillfully constructing a gutter, or negligently suffering it to be out of repair or obstructed, by reason of which surface water floods an adjacent lot, is liable to the owner although the lot was below grade. *Gilluly v. City of Madison* (63 Wis. 518), 299.
3. **Liability for action of board of health.]** A city is not liable for the acts or negligence of a board of health constituted a separate body by the charter, whether appointed by the legislature directly or by the city in pursuance of the charter. *Bryant v. City of St. Paul* (33 Minn. 289), 81
4. **Liability for nuisance.]** A city, for the purpose of improving its sanitary condition, collected and deposited in one place all the carcasses, garbage, excrement, etc., and buried them there. *Held*, that the city was not liable to an individual for sickness produced thereby. *City of Fort Worth v. Crawford* (64 Tex. 202), 758
5. **Liability for officer's compensation.]** A city, having a treasurer duly appointed and qualified under the general act of incorporation, cannot defeat his right to commissions for disbursement of the municipal funds by placing them in the hands of the mayor for disbursement. *Board v. City of Decatur* (64 Tex. 7), 735.
6. **Negligence — of physician for poor.]** A municipal corporation is not liable for the negligence of a physician for the poor, unless the corporation is shown to have been negligent in his selection. *Summers v. Board of Commissioners of Daviess County* (108 Ind. 262), 512.
7. **Ordinance — as to pawnbrokers — reasonableness.]** A city ordinance requiring every licensed pawnbroker to make out and deliver to the superintendent of police, every day, before noon, a legible and correct copy from a book to be kept by him, of all things received on deposit or purchased during the preceding day, together with the hour when received

MUNICIPAL CORPORATION — Continued.

- or purchased, and a description of the pledgor or seller, is not unreasonable. *Launder v. City of Chicago* (111 Ill. 291), 625.
8. **Power to employ counsel.]** Trustees of a town have implied power to employ counsel to defend the marshal against an action of false imprisonment brought by one arrested by him for violation of a town ordinance. *Cullen v. Town of Carthage* (103 Ind. 196), 504.
9. **Requirement that lot owners shall clear snow and ice from sidewalk.]** A city has no right to require owners or occupants of lots to keep the sidewalks in front clear of snow or ice or to sprinkle ashes or sand thereon, and inflict a fine for neglect. *City of Chicago v. O'Brien* (111 Ill. 582), 640.
- See CONSTITUTIONAL LAW, 602.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

1. **Action — municipal ordinance — when inures to third person.]** Where a city ordinance in pursuance of the charter makes it unlawful to leave a team standing unfastened or unguarded in a street, any one injured by a violation thereof may maintain an action against the wrong-doer. *Bott v. Pratt* (88 Minn. 828), 47.
2. **Contributory — rescuing child.]** It is not contributory negligence in a mother to attempt to rescue her infant child from an approaching railroad train, although she may have negligently allowed it to go on the track. But the defendant is not chargeable unless it was negligent in respect to the child before, or in respect to the mother or child after, the attempt at rescue. *Donahoe v. Wabash, St. Louis & Pacific Railway Company* (83 Mo. 560), 594.
3. **Municipal officers removing infected persons.]** While the board of health, mayor and marshal of a city may remove from the city persons infected with small-pox, yet they are liable for negligence in doing so, and for removing them in stormy weather and putting them in an unsafe and unprotected tent, whereby they are so exposed that death ensues. *Aaron v. Broiles* (64 Tex. 816), 764.
4. **Savings bank managers.]** Managers of savings banks, although not receiving pay, are liable for injury by want of ordinary care. *Williams v. McKay* (40 N. J. Eq. 189), 775.

See CRIMINAL LAW, 466, 885; GUARDIAN AND WARD, 806; MASTER AND SERVANT, 266, 292, 691; MISTAKE, 669; NOTARY PUBLIC, 189; RAILROADS, 756, 809; TELEGRAPH, 56, 754.

NEGOTIABLE INSTRUMENT.

1. **By agent of corporation — seal.]** A promissory note phrased, "we promise," etc., and signed by one, with the addition, "Prest.," and by another with the addition, "Sec. G. M. Co.," and impressed with a seal inscribed, "Granger Market Co., Portland, Oregon, November 4, 1874," is the obligation of the corporation. *Guthrie v. Imbrie* (12 Oreg. 182), 831.

NEGOTIABLE INSTRUMENT — *Continued.*

2. **Certainty in amount.]** A note providing for "interest at ten per cent per annum until paid, seven if paid when due," is not rendered non-negotiable by this provision. *Smith v. Crane* (83 Minn. 144), 20.
3. **Check — equitable assignment.]** As between drawer and holder, a check is an equitable assignment, and the drawer may not arbitrarily stop payment. *Pease v. Landauer* (68 Wis. 20), 247.
4. **Note on demand — holding indorser.]** No action lies against the indorser of a joint and several promissory note, not of a partnership, payable on demand with interest, where no demand was made as to one of the makers until after the statute of limitations had run against it. *Shetts v. Fingar* (100 N. Y. 539), 231.
5. **"Without interest" — interest after maturity.]** A note payable in six months, "without interest," bears interest from maturity. *Roberts v. Smith* (64 Tex. 94), 744.
6. **Notice of equities.]** The indorsement of a note "for collection" is notice to a purchaser that the indorsee is not the owner. *Merchants' Nat. Bk. of St. Paul v. Hanson* (83 Minn. 40), 5.

See INTEREST, 711.

NOTARY PUBLIC.

Negligence.] No action lies against a notary public for defectively certifying a married woman's acknowledgment of a deed, unless he acted maliciously or corruptly. *Henderson v. Smith* (26 W. Va. 829), 139.

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NUISANCE.

1. **Danger to only a few.]** A powder magazine may be a nuisance although it affects only the plaintiff. *Emory v. Hazard Powder Company* (22 S. C. 476), 730.
 2. **Joinder of actions.]** A cause of action for damages by a nuisance may be joined with a demand for an injunction against it. *Id*
 3. **Jail]** An injunction will not issue to prevent the erection of a jail on the ground of nuisance. *Burwell v. Commissioners of Vance County* (93 N. C. 78), 454.
- See* DAMAGES, 121; MARRIAGE, 576; MUNICIPAL CORPORATION, 753.

OBSCENITY.

See CRIMINAL LAW, 840.

OFFICE AND OFFICER

See MUNICIPAL CORPORATION, 735.

ORDINANCE.

See MUNICIPAL CORPORATION, 625; NEGLIGENCE, 47.

PARDON.

Conditional — effect on competency of witness.] A pardon, subject to revocation by the governor whenever he shall determine that the convict has violated any of the criminal laws of the State, does not restore his competency as a witness. *Carr v. Smith* (19 Tex. Ct. App. 635), 395.

PARENT AND CHILD.

Custody of child.] On a proceeding by a father to obtain the custody of his infant from its maternal grandparents, to whom he had intrusted it, the court will not grant the application if it is seen to be against the interests of the child, although there was no gift of the child, and the statute enacts that the father of a minor shall have the custody of it. *Jones v. Darnall* (108 Ind. 569), 545.

PARTITION.

Tenants in common — allowance for improvements.] Where a widow, at her own expense, erected buildings on unimproved land belonging to herself and her infant children, which they all enjoyed together, she should be allowed on partition for the improvements, or the improved part should be set off to her. *Buck v. Martin* (21 S. C. 590), 702

PHYSICIANS

State board of health — mandamus.] Under a statute regulating the practice of medicine and surgery, an applicant for leave to practice who has a diploma must furnish the State board of health satisfactory proof that it was granted by some legally chartered institution in good standing. *Held*, that the granting of leave by the board is discretionary, and will not be enforced by *mandamus*. *State v. Gregory* (88 Mo. 128), 565.

PLEDGE.

See INSURANCE, 202.

PRESUMPTION.

Of death.] *See* EVIDENCE, 827; MARRIAGE, 253.

PRINCIPAL AND AGENT

See AGENCY; SURETY, 416.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS, 281.

RAILROAD.

1. **Duty to keep stations safe.]** A railroad company is bound to make and keep its station platforms and the approaches safe for persons going there to receive or part with passengers. *Hamilton v. Texas and Pacific Railway Company* (64 Tex. 251), 756.
2. **Fencing station grounds.]** A railroad company is not relieved from the duty of fencing and making cattle-guards at a wagon-crossing by the facts that it is in the company's yard in a city and it would be difficult to do so. *Greeley v. St. Paul, Minneapolis and Manitoba Ry. Co.* (33 Minn. 136), 16.
3. **Killing cattle — owner's contributory negligence.]** Where horses get on an unfenced railway track and are injured by a train, the owner's contributory negligence in allowing them to escape is no defense. *Burlington, etc., R. Co. v. Webb* (18 Neb. 215), 809.
4. **Street through yard — horse railway through street.]** A public street in a town ran through the yard of a railroad company. The town authorities granted to a street car company the right to lay and operate their track through that street. *Held*, that the street car company should not be enjoined from laying and using their track through the street in the yard. *Texas and Pacific Railway Company v. Rosedale Street Railway Company* (64 Tex. 80), 789.

See CARRIER, 194, 500, 558, 656; FIXTURES, 622; MASTER AND SERVANT, 85, 292, 616, 691, 842; TAXATION, 758; WATER-COURSE, 581.

REFORMATION.

See MISTAKE, 600.

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See DEED, 747.

RIPARIAN OWNER.

See WATER AND WATER-COURSE, 206

SALE.

1. **For pre-existing debt — retaining possession.]** Where one sells personal property for the consideration of a pre-existing debt, and for the convenience of the purchaser retains possession, such retention is not necessarily fraudulent as against creditors. *Pregnall v. Miller* (21 S. C. 385), 684.
2. **Fraud — insolvency.]** Where one knows himself to be insolvent, and buys goods on credit, concealing that fact and intending not to pay, and falsely representing himself to be a mayor, the seller may recover the goods from him. *Des Farges v. Pugh* (93 N. C. 81), 446

SCHOOLS.

Regulation that scholars shall carry wood.] A rule of a public school, that every scholar on returning from recess shall bring in a stick of wood for the fire, is not "needful for the government" of the school. *State v Board of Education* (63 Wis. 234), 282

SEAL.

See NEGOTIABLE INSTRUMENT, 331

SET-OFF.

See EXECUTOR AND ADMINISTRATOR, 278; TAXATION, 432.

SHIP AND SHIPPING.

Registration — mortgage.] A vessel, used exclusively in North Carolina waters, was enrolled under the act of Congress. It was mortgaged, and the mortgage was recorded in the custom house, as required by the act, but not registered as required by the State law. *Held*, that the recording was valid. *Lawrence v. Hodges* (92 N. C. 672), 436.

SIDEWALKS.

See CONSTITUTIONAL LAW, 23; MUNICIPAL CORPORATION, 640.

SLANDER.

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

Destruction of subject of contract.] The plaintiff contracted to sell and the defendant to buy a leasehold interest in land to commence in the future. Before the day an ocean storm washed away part of the land. *Held*, that specific performance should not be decreed. *Huguenin v. Courtenay* (21 S. C. 408), 688.

STATUTE.

1. "Dispose of" — giving away liquors.] In a statute prohibiting the unlicensed sale of intoxicating liquors, the words "disposing of" include giving away. *State v. Deusting* (83 Minn. 102), 12.
2. "Drummer." A merchant, having a fixed place of business, and there selling a single lot of goods, consigned to him from another State and already paid for by him, to a resident of the same place is not a "drummer." *State v. Miller* (93 N. C. 511), 469.
3. "Spirituous liquors." Cider or crab-cider is not a "spirituous liquor," nor of "like nature as wine, ale, porter or beer." *State v. Oliver* (26 W. Va. 422), 79.

Evidence of passage.¹ See CONSTITUTIONAL LAW, 814.

See SCHOOLS, 282.

STATUTE OF FRAUDS.

1. Contract to buy lands, sell, and divide profits.] An oral agreement by which one is to negotiate the purchase of land, and the other is to pay the price and take title, and when the latter shall sell, the profits shall be divided between them, is not within the statute of frauds. *Snyder v. Wolford* (83 Minn. 175), 22.
2. Lease — debt of another.] Where on the assignment of a lease, the assignee orally agreed to assume the covenants, and pay the rent, this was not a promise to answer for the default of another, within the statute of frauds. *Wolke v. Fleming* (103 Ind. 105), 495.
3. Performance — consideration.] Where one has rendered services, or transferred property, under a contract voidable under the statute of frauds, he may recover the value of the services or property. *Id.*

STATUTE OF LIMITATIONS.

1. Acknowledgment.] An unsigned memorandum, found among the maker's papers after his death, is not an acknowledgment sufficient to take a debt out of the statute of limitations. *Abercrombie v. Butts* (72 Ga. 74), 832.
2. Trustee.] Managers of a savings bank are trustees for depositors, and the statute of limitations does not run against a claim of injury by neglect on their part. *Williams v. McKay* (40 N. J. Eq. [13 Stew.] 189), 775.

STOCK.

See ACTION, 855

STREET.

See RAILROAD, 739.

SURETY.

1. Conditional delivery of bond.] Where a surety on a bond given to the State as security for a bank depository signs it before another surety, whose name precedes his in the body of the bond, but is forged thereto in the signature, and where the name of the same person, as well as that of

SURETY — Continued.

another whose name appears before that of the complaining surety in the body of the bond, appears as being signed to an affidavit that they were worth a certain sum, but in fact their names were forged to it; and where the complaining surety intrusts the bond to the president of the bank as an escrow, not to be delivered to the State until these sureties execute it, but the president does deliver it to the governor who is the obligee, the complaining surety is liable thereon. *Mathis v. Morgan* (72 Ga. 517), 847.

2. **Contribution between sureties — evidence.]** In an action by an apparent principal against an apparent surety on a sealed note for contribution, evidence is competent to show that both were principals. *Williams v. Glenn* 92 N. C. 258), 416.

SURFACE WATER.

See MUNICIPAL CORPORATION, 279, 299; WATER AND WATER-COURSE, 581.

SURROGATE.

See CONSTITUTIONAL LAW, 161.

TAXATION.

1. **Equality and uniformity.]** A law imposing a tax on owners of sleeping cars for running them over the railway of another, but exempting the act of running the same kind of cars over the road of the owners of the cars, is unconstitutional. *Pullman Palace Car Co. v. State* (64 Tex. 274), 758.
2. **Injunction to restrain collecting of illegal tax.** At the suit of one or more dog-owners, on behalf of themselves and all other dog-owners in the county, an injunction may issue to restrain the collection of a dog-tax on the sole ground of illegality, in order to prevent a multiplicity of suits. *Williams v. County Court* (26 W. Va. 488), 94.
3. **Set-off — "debt."]** A tax is not a "debt," and in an action by a municipal corporation to enforce a tax, the defendant may not set off or counterclaim, either in law or equity, a debt due him from the corporation. *Gatling v. Commissioners of Carteret* (92 N. C. 586), 482.

TELEGRAPH.

1. **Mistake of clerk in correcting mistake of sender.]** A telegraph company is not liable for a mistake of its clerk in endeavoring, at the request of the sender, to correct a mistake in the written message. *Western Union Tel. Co. v. Foster* (64 Tex. 220), 754.
2. **Negligence — fall of wires.]** A telephone company is liable for an injury to a traveller caused by the fall of wires on a street, although the fall was occasioned by ice produced by water thrown upon them by the fire department. *Nichols v. City of Minneapolis* (83 Minn. 480), 56

See CONTRACT, 634.

TENANTS IN COMMON.

See PARTITION, 702.

TRESPASS

See INJUNCTION, 842.

TRIAL.

Compelling plaintiff to walk.] On the trial of an action for personal injuries, the uncontradicted proof showing that since receiving them the plaintiff walked lame, the court commits no error in refusing to compel him to walk across the court-room in presence of the jury. *Hatfield v. St. Paul and Duluth R. Co.* (83 Minn. 180), 14.

TROVER

See ACTION, 355.

USURY.

Commissions — interest on advances — contract — consideration.] In consideration of advances by plaintiff, who were cotton factors, defendant agreed to repay the advances with ten per cent interest, and also to ship to plaintiffs two hundred bales of cotton, to be sold on commissions, and failing so to do, to pay commissions for every bale deficient. *Held* not usurious, and supported by a sufficient consideration. *Norwood v. Maulkner* (22 S. C. 367), 717.

See BANKS, 113.

VENDOR AND PURCHASER.

Failure of title of part — mistake.] Where there is a contract for sale of several adjoining parcels of land for an entire sum, with general warranty of title, and the purchaser is evicted from a portion for want of title, he may hold the remainder and have proportionate abatement or compensation, although there was a mutual mistake as to the title. *Butcher v. Peterson* (26 W. Va. 447), 89.

WAREHOUSEMAN.

Receipt — transfer of title.] Where a warehouse receipt runs to the bailor personally, and is not negotiable in form, the bailor may not effect a transfer of the title by mere delivery of the receipt without the consent of the warehouseman. *Gill v. Frank* (12 Oreg. 507), 878.

WATER AND WATER-COURSE.

1. **Boundary — mill-race.]** Where one conveys to another by deed lands on both sides of a mill-race, in two separate parcels, describing each by metes and bounds, separately, and bounding on the "edge" or "lines" of the race, no part of the bed of the race passes by the grant. *Carter v. Chesapeake and Ohio R. Co.* (26 W. V. 644), 116.
2. **Sea coast — riparian owner — changes in coast.]** The plaintiff owned land on the sea coast at Far Rockaway, Long Island. Several miles east of his land was the island of Long Beach, bounded on the east by an inlet from the ocean to Hempstead bay. Between 1835 and 1869 the beach from opposite the island to the west of plaintiff's land was overflowed and

WATER AND WATER-COURSE — *Continued.*

washed away, and bars, shoals and islands were formed and constantly changing. By sudden, violent and frequent changes the inlet moved to the west of the plaintiff's land, and a continuous bar was formed. About 1869 the inlet closed up and the original one reopened, leaving a continuous beach to the west, with a lagoon inside of it running across the plaintiff's land. *Held*, that the title to that beach was in the plaintiff. *Mulry v. Norton* (100 N. Y. 426), 206.

3. **Injunction.]** The plaintiff, keeper of a seaside summer hotel, was entitled to the beach in front of his premises, to which visitors resorted for bathing and air. The defendants setting up title, intruded thereon and undertook to get possession, and threatened litigation. One of them was of no pecuniary responsibility. *Held*, that an action to quiet title and for an injunction would lie. *Id.*
3. **Surface water—obstruction by railroad.]** A railroad is not liable to a landowner for an injury by an overflow of surface water occasioned by the road-bed skillfully constructed. *Abbott v. Kansas City, St. Joseph and Council Bluffs R. Co.* (88 Mo. 271), 581.

See DRED. 324.

WILL.

1. **Child omitted — estoppel by probate.]** A child and heir at law of a testator, for whom his father has by mistake failed to provide by the will, but who, being of full age, has appeared in proceedings resulting in a judgment establishing the will, cannot recover land thereby devised. *Newman v. Waterman* (68 Wis. 612), 810.
2. **Devise for life—remainder—remainderman dying in life-time of tenant.]** On devise to M. for life, remainder to G. in fee, dying during the life-time of M., the estate descends to M.'s heirs. *King v. Scoggin* (92 N. C. 99), 410.
3. **Executory devise limited after fee.]** F. died in 1791, leaving a will devising lands to his wife for life, with remainder to his son D., his heirs and assigns forever. He devised other lands to his son H. The will subsequently provided if either of his sons should die "seised of the estate hereinbefore bequeathed," or any part thereof, without lawful issue, that then the estate of him so dying seised hereby bequeathed shall descend to the other." The widow having died, D. took possession and died intestate, without issue and in possession. *Held*, that at common law D. had an absolute power of disposition, the limitation over was void, and D. took absolute title. *Van Horn v. Campbell* (100 N. Y. 287), 166.
4. **Legacy—not charged.]** Where a will devises land to A., and provides that B. "shall have her support out of the land," the legacy is not a charge on the land. *Gray v. West* (93 N. C. 442), 462.

See MARRIAGE, 402.

WITNESS.

See PARDON, 895.

WOMEN.

As attorneys.] *See* ATTORNEY, 838.

WORDS.

"Carriage."] *See* CONTRACT, 287.

"Debt."] *See* TAXATION, 432.

"Dispose of."] *See* STATUTE, 12.

"Drummer."] *See* STATUTE, 469.

"His own premises."] *See* CRIMINAL LAW, 472.

"Instrument in the nature of."] *See* MORTGAGE, 661.

"Judge."] *See* CONSTITUTIONAL LAW, 161.

"Lawful rate."] *See* INTEREST, 845.

"Needful for the government."] *See* STATUTE, 282.

"Spirituous liquors."] *See* STATUTE, 79.

"Support."] *See* CONTRACT, 458.

"Taking."] *See* CRIMINAL LAW, 236.

"Wagon."] *See* EXECUTION, 767.

"Wearing apparel."] *See* EXECUTION, 674.





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